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EMBRACING

THE BRANCHES OF AMERICAN JURISPRUDENCE

HOW TO STUDY LAW AND BLACKSTONE'S COMMENTARIES.

CONSTITUTIONAL LAW—FEDERAL AND STATE—
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PUBLIC INTERNATIONAL LAW, AND LEGAL ETHICS—
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CHADMAN'S CYCLOPEDIA OF LAW

REAL PROPERTY AND PLEADING AND PRACTICE

CONTAINING

A HISTORY OF PROPERTY, DEFINITION OF VARIOUS
KINDS OF ESTATES, METHODS OF ACQUIRING
TITLE AND ABSTRACTS OF TITLE;
TOGETHER WITH THE OBJECTS OF
PLEADING AND PROCEDURE AND
PRACTICE AT COMMON LAW

INCLUDING

LEADING CASES

VOLUME X

EDITOR IN CHIEF

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

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PREFACE.

Those who intend following law as a profession, will find Real Property one of the most interesting of the twelve volumes of the Cyclopedia of Law.

Real Property is the foundation on which a legal education must be built. It is the wealth of every nation, indestructible and imperishable. The law as laid down by the statutes of our several States, is the same as the English law, amended and modified to meet the requirements of the people of each respective State, and the peculiar conditions which exist there.

The law pertaining to Real Property traces back so far, that we know not when it began, for we find it has come to us, step by step, originating with the customs of barbaric people.

Real Property therefore becomes not only an interesting, an important, but an absolutely necessary study for all those who desire a complete education covering all that pertains to the law in general.

Those who read law, but not with the intention of being admitted to the bar, will find this volume equally interesting.

The student will read with very great profit what is written on pleading and practice. The one who contem-

plates practicing law, must be thoroughly posted on how to prepare his cases and place them properly before the courts. Equally important is that of practice, for, unless he is able to present his matters in a clear, concise and legal manner, he cannot properly protect the rights of his clients and will bring failure to himself.

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LAW OF REAL PROPERTY.

CHAPTER I.

THE EARLY HISTORY OF PROPERTY.

Sec. 1431.* CLASSES OF PROPERTY.—**MOVABLE AND IMMOVABLE.**—In the infancy of civilization property consisted almost solely of visible and tangible articles, such as cattle, sheep, buildings and land, now termed *corporeal*, as distinguished from *incorporeal* property, as debts, rights in action, and the like, so common to modern civilization. Of tangible, or corporeal property, there are plainly two classes, thus we have, sheep, cattle, and articles that may be transported from place to place, or consumed, on the one hand, and land, houses, and the like, which are permanent and stationary in character; or *movable* and *immovable* property. This division of property into movable and immovable was made in the early years of our civilization and continues one of the most fundamental classifications of property, and to which the history of the Anglo-Saxon race has added many important circumstances.†

*This book is No. 10 of the Cyclopaedia of Law; the former 1,430 sections comprise the first nine books of the Series.

†Williams, Real Prop. 1, 2.

Our American law of real property is that of England, which our forefathers brought to this country in colonial times, and which became so firmly rooted that but few changes, and these chiefly statutory, have been made. A few principles of the English law, such as entails and the principles of primogeniture, being contrary to our system of government, soon died out, or were legislated away.

The history of real property in England has much to do with the rise, development, and fall of feudalism, and it therefore becomes important that the student should investigate to some extent the principles and characteristics of a system which, though it has passed away, has left its markings on our legal system.*

*The feudal system was first established by the Goths and Vandals when they overran and subdued Rome. Under this system land was made the basis of government, and all land was regarded as held by the king. As these barbarian hordes came down from the north of Europe they took possession of all property, both real and personal, belonging to those they subdued. The king, or chief, divided the property among his followers; the real property, or land, was not given to them outright, but was allotted to the chief men and soldiers, in large parcels, which "allotments were called *feoda*, feuds, fiefs, or fees: which last appellation in the northern language signifies a conditional stipend or reward." (2 Bl. Com. 45.) The condition annexed to these holdings was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given, to do which the holder had to take an oath of fealty, and on failure of the condition the lands again reverted to the chief or king who had granted them. The chief men to whom the large tracts were given, called tenants in capita, again divided the land

By the Norman Conquest of England, in 1066, the lands formerly owned by the Saxons were for the most part confiscated, and re-granted by William the Conqueror to his soldiers under the principles of the feudal system, that is, the lands instead of being held freely, or as allodial lands, were held under a sort of rental, consisting in the performance of military service to the immediate superior of the holder, until such service reached the king, or lord paramount, who was deemed to be the owner of all the land. This system was soon applied to all the lands in England, both those confiscated and those that were allowed to remain in the hands of their former Saxon owners.* So that in a short time after the Norman Conquest, the principle became firmly established, that there were no free lands, but that all lands were mere holdings, tenures (from *tenir*, to hold), or estates subject to the claims of the lord paramount or king, in whom the title, and right of disposition rested. This idea, that property in land is a mere holding or estate, has clung to our real property law ever since, so that today, title to land is not absolute, the owner only having an estate therein.†

among his immediate followers on the same principles, granting the use of the land, while reserving the title, the same relation as to rendering military service or returns for the land being kept up as between the king and tenant in capita. (2 Bl. Com. 45, 48; Wright's Tenures, 61, 62.)

*Williams' Real Prop. 4; Stubbs, Const. Hist. Eng. Vol. 1, Ch. ix.

†Williams, Real Prop. 17. Estate, or in Latin, *status*, signifying the condition or circumstances in which the owner stands with regard to his property.

The system of tenures, or holdings, established under the feudal system, only applied to land, or immovable property; sheep and cattle and other movable property were not of sufficient importance, or were too easily disposed of to bring under the system, and their control and ownership by individuals was regarded as absolute.*

"Lands, houses, and immovable property,—things capable of being held in the way above described,—were called *tenements* or *things held*. They were also denominated *hereditaments*, because, on the death of the owner, they devolved by law to his heir. So that the phrase, *lands, tenements*, and *hereditaments*, was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day."† The other class of property, *movable*, was designated as goods or chattels, terms still in common use.

Sec. 1432. ORIGIN OF THE TERMS "REAL PROPERTY" AND "PERSONAL PROPERTY."—Under the feudal system land was known by the name of *tenements* and this designation maintained until the feudal system began to decline, commercial systems to spring up, and the growth of liberty among the people demanded a change in the ideas prevailing as to the ownership of land. The final blow at the feudal system was not given until the restoration of Charles II, when a statute abolished most of the forms

*Co. Litt. 191a, n.

†Williams, Real Prop. 5.

of tenures theretofore existing and simplified the law as to land, though the old forms still remained. This statute (12 Car. II, c. 24) abolished tenures by knight service and many of the feudal restraints upon alienation of land, and reduced nearly all tenures to free and common socage, by which was meant tenure by rendering some conventional service not military. And it was upon such a grant that the land in most of the American colonies was given to the colonists by the king, simply recognizing the doctrine of fealty.*

As the feudal system passed away, and disputes over the right to the possession of land arose between the lord and tenant, another important distinction between land and chattels became apparent, the *real* land could be restored in an action at law, while in the case of goods the remedy was usually against the person who had taken and disposed of them. So that, growing out of the remedy applicable to the recovery of the two sorts of property, and the actions therefore, *real* actions, and *personal* actions, land and tenements came to be called *real property*, and goods and chattels *personal property*.†

Sec. 1433. OF THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.—The terms *real property* and *personal property* are now more common than the ancient designations; while the latter class has grown into almost as much

*Wright's Tenures, 142; Williams, Real Prop. 6n.

†2 Bl. Com. 16,384; 3 *Id.* 144.

importance as the former. Many sorts of property which are in a way fixed and immovable, as shares of stock in railways, are yet personal property, while following the old system, titles of honor are considered as real property since in ancient times they were annexed to the ownership of certain lands.* On the contrary, a lease of lands or houses for a term of years, was, and is, considered as personal property, since the tenant's possession, though for a long term of years did not make him the owner of the land, or make the tenant liable to any of the feudal dues exacted from those holding by other grants, or descend to his eldest son as heir at law, but was merely a chattel interest to the use of the land.†

Another distinction between real and personal property coming down from feudal times is, that on the death of the owner intestate, the real property goes to his heir, while personal property is distributed by the administrator among the *next of kin* of the intestate, or, under modern statutes, the personal property is first taken to pay debts and obligations, while the real property goes to the heirs, unless necessary to pay debts.

Sec. 1484. CORPOREAL AND INCORPOREAL PROPERTY.—In addition to the classification of property into movable and immovable, personal and real, there is another division also to be noted, that of *corporeal* and *incorporeal*. By corporeal property

*Hallam's Middle Ages, 158; Williams, Real Prop. 8.

†Co. Litt. 46 a; Williams, Real Prop. 9.

is meant visible and tangible property, as a house, a parcel of land, chattels, and the like; while an annuity, or annual rents derived from land, is incorporeal property, since it has only a mental existence, is intangible, invisible, and only exists in contemplation of law. In ancient times writing was not commonly employed, as very few people could write, so that the distinction between these two classes of property became important in the manner of their transfer. Corporeal and tangible property was delivered from one to another by actual transfer (livery of seizin), or by a symbolical delivery in the case of land or bulky articles; while a transfer of incorporeal property, not being capable of this actual transfer in the presence of witnesses, had to be made in writing.* It is with corporeal property, and that class of it known as real property or hereditaments, since it descends to the heir on the death of the owner that we are now concerned.

Sec. 1485. OTHER TERMS USED TO DESIGNATE CORPOREAL HEREDITAMENTS, OR LAND.—A number of words and phrases that have come to have general significance and meaning

*Things incorporeal were anciently said to *lie in grant*, while corporeal hereditaments were said to *lie in livery*. 2 Bl. Com. 20; Co. Litt. 9 a. Under the old common law *seizin* was regarded as the evidence of ownership, and no transfer of title to land was regarded as good until livery of seizin was made to the alienee. So that a deed to land without livery of seizin passed no title, while if livery of seizin was made it was a good transfer, because of the notoriety of the transfer, without any deed. Gilbert on Tenures, 77.

and are commonly used in the law of real property need some explanation to enable the student to comprehend their meaning. The word *messuage* is used by the profession the same as house, and while formerly considered as having a more comprehensive meaning, they are now deemed nearly synonymous, each comprising not only buildings, but also outbuildings, the orchard, curtilage, and perhaps the garden surrounding the house, when used in a legal instrument.*

The word *tenement* is also used in law to designate a house, and is the regular synonym following the word *messuage* in a lease, but whenever the sense requires it will be given a more comprehensive meaning, including land generally.†

The word *land*, in its legal signification, includes all soil or earth generally, but in its strict and primary import it referred to arable land. But in our law it includes everything attached to it or constructed upon it, as houses, bridges, buildings of every description; and a grant of a parcel of land carries with it not only the things upon the surface of the land, but also everything above and below the surface, from the center of the earth to the highest heavens, the maxim being, *cujus est solum, ejus est usque ad coelum*.‡ So that a pond of water passes with the land as land covered by water, and the mines and minerals below the surface

*Williams, Real Prop. 13; 27 Beav. 242; *Smithson v. Cage*, Cro. Jac. 526.

†2 Bl. Com. 16, 17, 59.

‡Williams, Real Prop. 14.

pass with a grant of the land, except gold and silver, which from immemorial times were claimed by the crown.† But this exception does not prevail in America.‡

The extensive meaning of the term *land* may be limited and controlled by the context, as where the term is used in plain contradistinction to houses, it will not include them. And minerals under land may be expressly excepted so as not to pass by a grant of the land, in which case the reservation would include in-

†1 Inst. 4 a; Case of mines, Plowd. 313. In the last case it was said that "the common law which is founded upon reason, appropriates everything to the persons whom it best suits; as common and trivial things to the common people; things of more worth to persons of a higher and superior class, and things most excellent to persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them, as in reason it ought, to the person most excellent, and that is the king." A most remarkable line of reasoning!

‡In most of the royal charters to the colonies, "all mines" were expressly included in the grants, with a reservation in some cases of a fourth or fifth of gold and silver ores.

The rights of owners of mines in America are governed by the rules of the common law, but the reservation to the state of the precious metals never obtained in this country to any extent. The right to such mines on the public lands in California is held to be vested in the United States merely as an incident to the ownership of the soil and not by any sovereign prerogative. The States of Pennsylvania and New York, by statute assert prerogative rights over mines to the extent of the English rule. Williams, Real Prop. 3; Kent Com. 378n; *Boggs v. Merced Co.*, 14 Cal. 375-6.

cidentally the right to use the land to get out the minerals, and the duty to leave sufficient support for the land.* .

The word *premises* is commonly used in law as meaning what has gone before, as, where certain facts have been recited in an instrument, and then follows, "in consideration of the *premises*," this means in consideration of the facts just stated. The word is not commonly used as designating property, unless a description has preceded its use in the same instrument.†

Sec. 1436. **AUTHORITIES ON THE LAW OF REAL PROPERTY.**—As our real property law is largely that of England, it follows that the books by English authors would be of authority here, and we have many English works, which with American notes are in common use. Among these we may mention the work by Joshua Williams, which has reached its 6th American edition and is a very useful compendium of real property law; and *The History of Real Property*, by Professor Digby, a book of great value to the person who desires to get to the very bottom of the subject. Washburn's treatise on the law of Real Property, in three volumes, is an exhaustive and authoritative work. Bingham's *Law of Real Estate* is another three volume work. In addition to these authorities the student will find it necessary to read the statutes of his State to

*Jarman on Wills (4th ed.), 777; *Earl of Cardigan v. Armistage*, 2 B. & C. 197; *Livingstone v. Moingona Coal Co.*, 49 Ia. 369; *Yandes v. Wright*, 66 Ind. 319.

†Williams, *Real Prop.* 15.

ascertain what changes, if any, have been made in the common law as to real property, and these statutes along with the leading decisions which may be found in such works as the *Lawyers' Reports Annotated*, will equip him not only for admission to the bar, but for actual practice of the law.

Note.—In the early history of the Saxon people, land was for the most part owned by the people in common. The only property that was not subdivided among the people generally to be held in common, was that actually occupied by the residence of the family. Thus, if a person built a house the land occupied by the house was regarded as his property, and was not subject to be divided. But the fields outlying the villages were held in common and divided from time to time among the people, as was done in Russia until quite recent times. These lands were then cultivated by the person to whom they were given. This was the system prevailing in England some time prior to the Norman Conquest.

At the time of the conquest of England by William, most of the land outside of the cities and towns was divided up into manors held by the crown and tenants in capita, for many of the feudal principles were introduced prior to the conquest by William. After the Norman conquest the feudal system was made to apply to all lands in England.

These manors held by the Danish earls contained from three to ten thousand acres, and were divided into acre strips. They were first divided into three great fields, in order that the tenants might have three fields. These fields were again divided into acre strips, four rods wide and forty rods long. For convenience in plowing these strips were made forty rods long, this being the distance the oxen could plow without stopping to rest. It was called a furrow-long, or furlong. Why the strips were four rods wide does not appear. Between each of the acre strips was a little space of uncultivated land which was allowed to grow up in

weeds, brush and grass, and these strips were to be seen in England for a thousand years or more.

The acre strips were portioned out to the villeins, by which was meant a person not a freeman, and from which word is derived our term villain, or person of bad repute. These tenant farmers occupied the same relation to the lord of the manor as the Russian serfs down to the time of Nicholas. Each villein was apportioned thirty acres to farm, ten acre strips in each of the three large fields, and these strips were not adjoining. In cultivating the land the villeins worked together. Each was obliged to keep two oxen for a team, which he could not sell without the consent of the lord of the manor. The villein formed an agreement with three others so as to have a full team with which to plow the land, and in the plowing each had his particular work to do, and the man holding the plow was obliged to plow his neighbor's land as well as he did his own.

When William the Conqueror ascended the English throne, over one thousand of these manors became his by right of succession. In addition to these crown estates, the estates of the nobles who opposed him, were confiscated and went to the king as lord paramount. These estates were granted by William to his military followers. These chief soldiers took the estates as they were left by their predecessors, so that in many cases the actual occupants of the land were not disturbed in their possession, but there was simply a change of masters. The lands of the church were left undisturbed, and also the manors of some of the nobles who had not opposed William.

In 1085, one year before the Domesday survey, all of the great landholders met the king at Salisbury Plains and took oath of fealty or homage, which was an acknowledgment that they held their lands from William as lord paramount. And from that day to this it is the theory of the English law that all title to land is derived immediately from the crown, and that there is no valid title unless the grant can be traced back to the crown.

The Domesday survey was an assessment or inventory of all the real property made by William the Conqueror twenty years after the battle of Hastings, in order to ascertain the holdings

and value of the various manors. In the first place commissioners were appointed by the king to go through the country and visit the various manors, and ascertain their size, the owner thereof, and from whom he derived title; also the number of acres of pasture land, woodland, and waste land, and the fisheries. The assessors also ascertained the number of freemen on the manors, cottagers and villeins, and in effect made a general assessment of all the property in England. From this data, called the Domesday book, the king was able to fix the returns he should receive from the holders of the manors.

This land in the manors, under the feudal system was held by military tenure, there being no taxes levied by the king, except directly on the tenants in capita, who were obliged to make certain returns to the king in the way of military service and equipment; thus to serve the king at least forty days in the year, and when so doing furnish all his arms, equipment, horses and provisions, and this was his return, or rent, for the use of the land. The amount of service and quantity of supplies to be furnished was also fixed in proportion to the amount of land held by the various tenants in capita. The relation established between the king and the tenants in capita, was again established between the lords of the manors and their tenants. The tenant could not alienate the land, but he could grant it to another upon the same terms he had received it; this was called sub-infeudation.

All persons who did not hold land were obliged to attach themselves to some one who did, for the purpose of obtaining their protection.

It was an age of profound ignorance, so far as knowledge of writing was concerned. There was not one in ten thousand who could read or write, a knowledge of learning being confined entirely to the clergy. Many of the barons could neither read nor write. As a result of this ignorance, seeing and hearing had to be relied upon rather than writing. The barons could not read, but they could recognize an impression made by their seal upon wax. Hence they carried a seal upon a ring, which they attached to all documents, that they might recognize them as their own.

This use of a seal became so customary that it has maintained ever since, but is now gradually giving place, and is not of much importance in the execution of documents.

Three times a year the king sat in his court composed of the great barons of the household and the bishops of the church, and the tenants of the land were obliged to appear and kneel before the king and take the oath of allegiance. Having taken the oath, the king threw upon him the robe of office, and this was called his investiture; that is, they were invested, or actually clothed with the land. This ceremony of taking the oath of fealty and investiture as between the king and tenants in capita, was again performed as between the chief tenants and their sub-tenants. After the ceremony of allegiance or fealty the tenant was actually put in possession of the land by livery of seizin, which was performed by the lord and tenant going upon the premises, and there in the presence of witnesses the lord would deliver to the tenant a tuft of grass or twig from the land, and declare the tenant to be in possession of all the land then granted to him; this ceremony taking the place of, and being considered of more importance than the execution of a deed. See, Freeman's *Norman Conquest*, Ch. xvii.; Stubbs' *Const. Hist.* Sec. 95; Digby's *Hist. of Real Property*, Chapters 1, 2; 2 *Bl. Com.* Ch. 4; Williams, *Real Prop.* Ch. 1.

CHAPTER II.

OF AN ESTATE FOR LIFE.

Sec. 1487. ORIGIN OF AN ESTATE FOR LIFE.—It is said by Blackstone and other writers that fees or estates were originally held at the will of the lord, and rose by degrees, through the stages of leases for years and for life, to the dignity of inheritances.* But Williams, in his work on Real Property, claims that an estate for life seems to have been the smallest estate in the conquered lands which the military tenant was disposed to accept.† This estate could not be sold by the tenant without the consent of the lord of the manor. So that a grant of land to A, was simply a grant for his life, and nothing further. It being an early established principle in feudal grants, that they were not to be extended beyond the express terms of the gift, but were to be construed strictly, and such lands on the death of the life tenant reverted to the grantor.‡

If a grant was to be of a greater estate than for life, it was necessary to show such intent that the descendants of the tenant were to succeed him, as by granting the land to "A and his heirs," or by other words showing such an intention. At first, in such a grant the heir

*2 Bl. Com. 57.

†Williams, Real Prop. 17.

‡Wright's Tenures, 29; 152.

took from the grantor since he was named in the original grant, and not from his ancestor. Hence it was said, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property."*

The feudal system did not long prevent the alienation of landed property, and by the statute of *Quia Emptores* (18 Edw. I, c. 1), the right of every free-man to dispose of his lands, or part of them, was expressly sanctioned, and at a later period by statute (32 Henry VIII, c. 1), the power to dispose of an estate in fee simple by will was sanctioned. This enlargement of the rights of the owner of land to dispose of same by devise and will continued until now there are no restrictions on the right of the owner of land to dispose thereof.† And the rule of construction followed in feudal times has been changed so that a grant of land is to be construed most strongly against the grantor, with the exception, coming down from feudal times, that a grant to A, simply, conveys but a life estate, and it is as necessary now, as it was in ancient

*Co. Litt. 191 a, n; *Burgess v. Wheate*, 1 Wm. Bl. 133.

†The statute of *Quia Emptores* abolished sub-infeudation, declaring "that from henceforth it shall be lawful to every free-man to sell of his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

times, to use the word heirs, if more than a life estate is to be granted. It is said that ignorance of this rule of law has served to defeat the intentions of many unlearned devisors. The rule has been modified by statute in many of the States of the Union, the words of inheritance being dispensed with by a provision that every conveyance passes the entire estate of the grantor, unless a contrary intent appears or can be implied from the deed.*

Sec. 1438. OF AN ESTATE *PER AUTRE VIE*.—When the owner of an estate for life sold his interest to another, the new owner had an estate for the life of his grantor, and this in Norman French was called an estate *per autre vie*, and the person for whose life the land is held is called the *cestui que vie*. Unless the grant to the new owner included his heirs, if he died before the *cestui que vie*, the land was left without an occupant while the life of the latter continued, as the law would not allow the *cestui que vie* to re-enter after

*“Generally speaking, no common person has the smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction which is now clearly established, is this: If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his *interest* passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator.” Per Lord Mansfield, in *Hogan v. Jackson*, Cowp. 306.

having disposed of his estate. Under these circumstances any one might enter on the land, and the one so entering was called a *general occupant*. But if the life estate held by A had been granted to "B and his heirs," the estate at the death of B would go to his heir until the demise of A, and such heir was designated a *special occupant*, since he had a special right of occupation by the words of the grant. To remedy this defect, a special clause in the Statute of Frauds (29 Car. II, c. 3, s. 12) was inserted, giving the owner of an estate *per autre vie* the right to dispose of it by will, and in case he made no will, and the estate was not one that would go to his heir, providing that it should go to his executors or administrators. The like statutes and others have been adopted in many of the United States, so that in this country an estate *per autre vie* is regarded as the real property of a decedent and becomes liable for the payment of his debts.*

Sec. 1439. INCIDENTS OF AN ESTATE FOR LIFE—MEANING OF FREEHOLD ESTATE.—The owner of an estate for life, designated as a tenant for life, was simply a *holder* of the land by feudal principles. Such an estate, as well as an estate *per autre vie* was regarded as a *freehold* estate, since it was regarded as the least estate worthy the acceptance of a *freeman*—one holding such an estate was known as a free-holder, and was entitled to certain rights and privileges not common to others, as to be summoned on

*For other obsolete provisions in regard to such estates see Williams, Real Prop. 20, 22.

juries and vote for certain shire officers.* This distinction as to freeholders still maintains in some of the states. These life estates at common law were not only terminable by the natural death of the tenant, but also by his outlawry, or civil death on entering a monastery.

The tenant for life had the right to cut wood for fuel and for use in his husbandry, repairing the buildings, fences, etc. But he could not cut timber unnecessarily, or commit *waste* by the wilful destruction of any part of the premises, called *voluntary waste*, or by negligence permit the buildings to go to ruin, called *permissive waste*. The common law decisions as to what constitutes waste on the part of such a tenant do not always apply in this country, as because of our forests and other dissimilar conditions it might be advisable to cut standing timber in order to clear the ground for farming.† At common law the life tenant could not plough up ancient meadow, or dig gravel, brick or stone, except in such pits as had heretofore been open and used, neither could he open new mines for coal or minerals, and if he did so it was held to constitute voluntary waste.‡

A tenant for life could of course not lease or grant his holding to endure beyond his lifetime, unless such

*Cruise on Real Prop. I, 61.

†Wilkinson v. Wilkinson, 59 Wis. 557; Stout v. Dunning, 72 Ind. 343; Keeler v. Eastman, 11 Vt. 298; Woodward v. Gates, 38 Ga. 212.

‡Simmons v. Norton, 7 Bing. 648; Viner v. Vaughan, 2 Beav. 466; Co. Litt. 54 b.

a power was given in his deed, and up to 1845, in England, an attempt so to do caused a forfeiture of his estate to the person next entitled. Crops sown by the tenant for life may be gathered by his executors as emblements, and the same rule applied to the undertenant of the life tenant.

Estates for life may be expressly granted, as those already discussed, or they may be such as are created by the construction and operation of law, as the rights possessed by husbands and wives in each other's land, to be hereafter considered.

CHAPTER III.

OF AN ESTATE TAIL.

Sec. 1440. MEANING OF AN ESTATE TAIL.

—An estate tail arose when land was granted to a man *and the heirs of his body*. It is such an estate as will descend, on the decease of the first owner, to all of his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine.* Estates tail were never common in the United States, as being foreign to our institutions, and where existing have been commonly abolished by statute. As a result of state statutes, words which would under the English law create an estate tail, or fee tail, now create a fee simple in the donee, or a life estate in the donee, with re-

*Williams, Real Prop. 35. Blackstone observes, "As the words *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if a grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children* or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs." 2 Com. 114.

mainder in fee simple to the issue as tenants in common.*

"An estate tail may be either *general*, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female*: an estate in *tail male* cannot descend to any but males, and male descendants of males; so an estate in *tail female* can only descend to females, and female descendants of females.† The possessor of an estate tail is called a *donee* in tail, the word *donee*, like *grantee*, and *lessee*, being the correlative of *donor*, *grantor* and *lessor*, are used to distinguish the person for whom an act is done, from him who is to perform it. The donee in tail is also called a *tenant in tail*, since his possession is but a holding; his estate is also a freehold, being greater than estate for life.

Sec. 1441. **EARLY HISTORY AND CONSTRUCTION OF AN ESTATE TAIL.**—The life estates first granted by feudal lords soon came to be enlarged into estates that were hereditary. To make such a grant we have seen that the word *heirs* had to be used.

*Perry v. Kline, 12 Cush. 118; Pollock v. Speidel, 17 O. S. 439; 4 Kent Com. 15 n.

†2 Bl. Com. 113, 114; Litt. ss. 13-21.

This term was at first limited to include only the direct issue of the tenant, but later the word heirs came to include collateral relations, such as brothers and cousins of the tenant, so that if it was desired to limit the estate to the offspring of the donee, it was done by making a grant to A *and the heirs of his body*, making what was then considered a *conditional gift*, the condition being that if the donee died without such mentioned heirs, or upon the failure of such heir at any future time, the land should revert to the donor.

In the earliest feudal times the ancestor had not the right to alienate his land so as to defeat the expectation of his heir, and the development of the right to alienate land was slow and extended over a long period of time. Part of the ancestor's land might be given as a marriage portion to his daughter, and to religious purposes, and lands so given became free from all manner of feudal service to the donor except the oath of fealty. At first lands were largely granted in consideration of services to be rendered, or a species of rent, there being no sales of land for cash, as is now customary. Gradually it came about that when a grant was made to A *and his heirs*, or the *heirs of his body*, that A had the unquestioned right to dispose of such lands, so far as it was possible under the feudal system to dispose of them, and thereby cut off the expectancy of the heirs. That is, by the reign of Henry III, it was established that though lands were granted to A and the heirs of his body, or to A and his heirs generally, A could by alienation cut off the expectancy of his heirs at once if the

estate was granted to him and his heirs generally, and if to him and the heirs of his body, he could do so the moment he had issue born satisfying the *condition* of the gift, and the alienee or purchaser took the estate not only during the existence of the issue, but also after their failure.*

Sec. 1442. SAME SUBJECT—OF THE STATUTE *de donis conditionalibus*.—The right of the tenant in tail to alienate his holdings the moment he had issue born that satisfied the conditions of the grant, was distasteful to the barons of the reign of Edward I, since it put an end to the reversions which they had intended should come about through the failure of issue. To remedy the evil to them, and restore the crumbling feudal system, they passed the famous statute *De Donis Conditionalibus* (13 Edw. I), also known as the statute of Westminster the Second, or simply the statute *De Donis*, by which it was enacted that from thenceforth the grant should be construed according to the conditions of the gift, that the will of the donor as expressed therein might be observed. This statute was intended to put an end to the right of a tenant in tail to dispose of holdings, and cause the property to remain intact to

*Co. Litt. 48 a; Williams, Real Property, 41. The tenant in tail might also have aliened the lands *before* issue born, but the effect of such alienation would only have been to exclude the lord during the life of the tenant, and during that of the issue, if such issue were subsequently born, while if the alienation were *after* the birth of issue, its effect was complete. Plowden, 241; Nevil's Case, 7 Coke 34 b.

his issue, or on failure thereof to revert to the original donor.* The effect of the statute of De Donis, while satisfactory to the barons or greater lords, was distasteful to the crown, as putting them beyond the penalties of forfeiture, since their estates were limited to their issue, and became galling to the trading and industrious classes. "Children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for the tenants' life."† The nobility, notwithstanding these evils, would not consent to repeal the statute, and entails existed in all their severity for a period of two hundred years, when alienation of such estates was again introduced by a scheme well worthy of the astuteness of the common law judges and lawyers.‡

Sec. 1443. SAME SUBJECT—OF COMMON RECOVERIES.—The right of the tenant in tail to

*"Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum talliatum*). The word *fee* (*feudum*) anciently meant any estate feudally held by another person; but its meaning is now confined to estates of inheritance—that is, to estates which may descend to heirs; so that a *fee* may now be said to mean an inheritance." Williams, Real Prop. 43; Wright's Tenures 5, 149.

†Williams, Real Prop. 44.

‡2 Bl. Com. 116, 358.

alienate his land being denied by the statute *De Donis*, and a repeal of the statute being impossible, the only way was to devise some new plan by which the holding of the donee in tail could be transferred to another, and the entail destroyed. This was accomplished by an unheralded decision of the common law judges in the 12th year of the reign of Edward IV, which is thus explained by Williams:

“In this case, called *Taltarum’s Case*, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that period quite unknown to the English law, for the monks had previously hit upon a similar device for the purpose of evading the statutes of Mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practiced with considerable success till restrained by act of parliament. In the case of which we are now speaking, the law would not allow the entail to be destroyed simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by means of a writ of *formedon*, so called, because they claimed *per formam doni*, according to the form of the gift, which the statute had declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came in to frequent and open use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, on the collusive action being brought,

was allowed to bring into court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had *warranted* the title; and accordingly begged that he might defend the title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against himself by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of *equal* value from the defaulter, who had thus cruelly failed in defending his title. If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default. But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the court was usually employed. So that, whilst the issue had still the judgment of the Court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate tail was said to be *barred*. Not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time. So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called *remainders* expectant on the estate tail), were equally barred. The demandant, in whose favor judgment was given, became

possessed of an estate in fee simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained: and the demandant, being a friend of the tenant in tail, of course, disposed of the estate in fee simple according to his wishes.”*

This system of barring an estate tail, known as suffering common recoveries, held its ground because of the substantial benefits to the general mass of people, and was perfected into a regular procedure, a privilege inseparably incident to an estate tail, which could not be restrained by custom, statute or covenant.† Entails were also allowed to be barred by a system of fines, or fictitious suits, commenced and then compromised by leave of court.‡ Both of these systems were later supplanted by an act of parliament, which permitted a tenant in tail in possession by a simple deed enrolled in the Court of Chancery to dispose of the lands entailed for an estate in fee simple.§ In Canada and such of the United States as have not abolished entails by statute, the tenant in tail may bar the entail by a simple deed acknowledged in open court for that purpose.¶

Sec. 1444. SAME SUBJECT—EXCEPTIONS TO THE RIGHT OF TENANT IN TAIL TO BAR THE ENTAIL.—There were several cases in

*Real Prop. 44, 45. See, also, 2 Bl. Com. 360.

†Taylor v. Horde, 1 Burrow, 84; Dewitt v. Eldred, 4 W. & S. 421.

‡2 Bl. Com. 348.

§Williams, Real Prop. 48; 3 and 4 Will. IV., c. 74.

¶Rev. Stat. Can. 100; Purdon's Dig. 721.

which the tenant in tail was not permitted to bar the entail as shown in the last section. Estates tail granted by the crown as a reward for public services could not be barred so long as the reversion remained in the crown. So it was held that an estate tail could not be barred by any person who is *tenant in tail after possibility of issue extinct*, as where an estate has been given to A and the heirs of his body by his present wife, and the wife dies without issue, A is then a tenant in tail after possibility of issue extinct, and could not suffer a common recovery so as to bar the reversion.†

Sec. 1445. SAME SUBJECT—RIGHTS OF A TENANT IN TAIL.—The tenant in tail could cut down timber and commit waste, without first barring the entail. He was also allowed by statute to make leases of the land, not to exceed twenty-one years, or three lives, from the day of making thereof, and the accustomed yearly rent had to be reserved. By statute, and otherwise, in England, estates tail are chargeable with the judgments for debts owing by the tenant in tail, and may also be disposed of in bankruptcy proceedings against the tenant in tail.*

An estate tail will descend if not barred to the issue of the donee, in due course of law, and in general the same as an estate in fee simple descends, as will hereafter be explained. Such estates are subject to the reciprocal claims of husband and wife in each other's property, as will also be hereafter explained.

†2 Bl. Com. 124, 125.

*Williams, Real Prop. 56, 57.

CHAPTER IV.

OF A FEE SIMPLE ESTATE, AND THE RULE IN SHELLEY'S CASE.

Sec. 1446. MEANING OF AN ESTATE IN FEE SIMPLE.—“An estate in fee simple (*feudum simplex*) is the greatest estate or interest which the law of England allows any person to possess in landed property. A tenant in fee simple is he that holds lands or tenements to him *and his heirs*; so that the estate is descendible, not merely to the heirs of *his body*, but to *collateral* relations, according to the rules and canons of descent. An estate in fee simple is of course an estate of *freehold*, being a larger estate than one for life or in tail.”*

The chief importance and characteristic of this estate is the unfettered right of alienation on the part of the tenant holding in fee simple. This right was not acknowledged at first, but was of gradual growth, being assisted by the statute of *Quia Emptores* (18 Edw. I, c. 1), which permitted the selling of land, or a part thereof, provided the feoffee, or purchaser, should hold the lands by the same services and customs as his predecessor had held them. The object of the statute being to protect the claims upon the land owing to the chief lord.* Another feature of fee simple estates, is

*Williams, Real Prop. 60; 3 Bl. Com. 224.

that they are subject, though in the hands of the heir or devisee, to debts of all kinds contracted by the deceased tenant. This liability for debts of the tenant on such an estate, while general and undoubted now, was also of slow growth. It is said, that in the early periods of English history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy, which rule was possibly borrowed from the Roman or Civil law. But the feudal system, seeking to keep the land free from personal obligations, infringed on this ancient rule, and in the reign of Edw. I, it was laid down by Britton that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so. This continued to be the law of England for a long period, and unless the ancestor had, by a deed in writing, under seal, called a *specialty*, charged himself as well as his heirs with the payment of a debt or contract, it was not allowed to become a claim against his estate. In 1807, by statute, the fee simple estates of deceased *traders* were rendered liable to the payment not only of debts in which their heirs were bound, but also of their simple contract debts; and in 1888 this provision was made to apply to all owners of fee simple estates.*

In America, the feudal doctrine, as regards the heir

*Williams, Real Prop. 79, 80.

of an estate taking it free from the debts of the ancestor never prevailed, and it is said that from the earliest settlement of the colonies, real estate has been liable to the debts and charges of the ancestor, in the hands of his devisees, his heirs, and *bona fide* purchasers from them. And this common law principle has been ratified by statute in many of the states, in some cases dating back to colonial times. So that, as a general rule, in the United States, lands are liable for the debts of a decedent, whether due by matter or record, specialty, or simple contract. In the two latter cases, the existence of the debt creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee, subject to the payment of all the debts of the ancestor, according to the laws of the state in which the lands are situated, and the right of the creditor can, in most of the states, be enforced against the lands in the hands of a *bona fide* purchaser, within certain statutory limitations as to time.

The right of alienation of an estate, except an estate tail, is now recognized as inherent, and it is impossible for any owner, by any means to divest himself of the right. Neither is it possible for the owner of an estate to prevent the involuntary alienation of it for the payment of his debts. And any condition in general restraint of its alienation is void.* Partial restraint on

**Schermerhorn v. Meyers*, 1 Denio 448; *Walker v. Vincent*, 7 Harris 369; *Gleason v. Fayerweather*, 4 Gray 348.

alienation, if reasonable, will be allowed.† And land may be so granted, in trust, that in case the one to be benefited by the trust becomes bankrupt, or attempts to dispose of them, they shall revert to the donor, and the interest of the bankrupt in such property thereby ceases.‡

Sec. 1447. THE RULE IN SHELLEY'S CASE, ITS ORIGIN AND EFFECT.—The rule in Shelley's Case, is a legal construction placed upon the words, "the heirs," "heirs of his body," and the like when used in a conveyance giving the grantor a freehold estate. The rule is stated thus: "When the ancestor, by any gift or conveyance (assurance), takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such case the expression *the heirs* are words of limitation of the estate, and not words of purchase."§ This rule takes its name from a celebrated case in Lord Coke's time, in which the rule was plainly formulated and laid down, but was in fact of much earlier origin.*

The rule as enunciated needs some explanation on account of the wrong meaning that might be given to

†Langdon v. Ingram, 28 Ind. 360; McWilliams v. Nisly, 2 Ser. & R. 507; Oxley v. Lane, 35 N. Y. 347; Hill v. Hill, 4 Barb. 419.

‡Williams, Real Prop. 94; Lockyer v. Savage, 2 Str. 947; Brandon v. Robinson, 18 Ves. 429.

§Williams, Real Prop. 254 n.

*Shelley's Case, 1 Rep. 94, 104.

the word "limitation." The explanation given by Williams, in his treatise, may be used for this purpose:

"We have already seen that, in ancient times, the feudal holding of an estate granted to a vassal continued only for his life. And from the earliest times to the present day a grant or conveyance of lands, made by any instrument (a will only excepted), to A. B. simply, without further words, will give him an estate for his life, and no longer. If the grant was anciently made to him and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out. A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift expressly in these terms, 'To A. for his life, and after his decease to his heirs,' should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the pur-

pose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner, a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs* and *heirs of his body* are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee. At the present time, when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave estate to the heirs or the heirs of the body of the grantee, after his decease, according to the letter of the gift.”*

In effect, the rule in Shelley’s Case determines when a tenant having a freehold grant shall be free to alienate it or bar the issue in tail, though the word heir is mentioned in the grant. It being held that in such cases the words *heirs* or *heirs of his body*, are not words of purchase, designating the person who takes under the deed, which would give the heir a present interest which could not be cut off by the grantee, but are simply to describe or limit—in the sense of bounding—the estate conveyed. That is, if lands are given or granted to A,

*Real Property, 254, 255.

and after his death to his heirs; or to A for life, then to B for life, remainder to the heirs of A, this immediate or mediate limitation to the heirs of A, under the rule in Shelley's Case, does not make such heirs purchasers, or confer upon them any interest in the grant which A cannot cut off by alienation; the words being descriptive of the estate given A, showing that it is larger than a life estate, and not descriptive of the persons who take the fee. So that the result of the rule is that A takes such an estate free from any obligations to the heirs, except such as were incident to an estate tail, and already discussed, to bar which, in early times, he would have to suffer a common recovery.

The rule in Shelley's Case is, therefore, a rule of law, since it is a rule of construction which determines the force, meaning and legal effect of the words, *his heirs*, when used in connection with other words and phrases.*

The object of the establishment of a definite rule for

*Tiedeman, *Leading Cases*, 355; 131 Pa. St. 56. In the Pennsylvania case, a grant was made to a woman and her heirs, in trust, and the trust was to be for the life of the woman, remainder to her heirs. The woman deeded the property and at her death her children brought a suit in ejectment to recover the land. The question being the construction of the words "her heirs." The court held that the rule in Shelley's Case prevailed in Pennsylvania, and the words simply described or bounded the estate of the mother, and that the heirs did not become purchasers thereunder, the mother taking an absolute fee with the right to dispose of it in her lifetime. And this rule has been extended to cover cases where the word heirs is so used, though the grantor did not intend it so, on the theory that a grantor is presumed to know the legal meaning of the words he uses.

the interpretation of words of inheritance is presumed to have been intended to prevent the inheritance or fee remaining in abeyance, and perhaps, also, to facilitate the alienation of land.* The rule resulted in a fixed and definite legal construction on the words "his heirs."

This meaning, it is to be understood, was the legal and technical meaning, but as regards devises, while the testator is presumed to have this technical meaning in view, yet this presumption may be overcome by showing that such an intent is inconsistent with the express meaning of the grant taken as a whole.†

Sec. 1448. CASES WHERE THE RULE IN SHELLEY'S CASE DOES NOT APPLY.—There are several cases where the rule in Shelley's Case does not apply, or which may be denominated as exceptions to the rule; these are:—

1. Cases where the ancestor is not granted an estate of freehold, that is, his estate is less than a life interest.
2. Cases where no estate of inheritance is given to the heirs.
3. When other explanatory words are subjoined to

*Perrin v. Blake, 4 Burr. 2579.

†10 Eng. Rul. Cases, 689; 4 Burr. 2579; 1 Wm. Bl. 672; 62 Ill. 86. "The origin of the rule, however plausible may be the suggestions of learned men upon the subject, is lost in obscurity; but whatever that may be, or whether its continuance can be justified upon any rational grounds, it still remains as firmly rooted in English jurisprudence as any other rule whose origin is clear, and whose utility is manifest."—Tudor's Leading Cases on Real Property, 482.

the word *heirs* showing an intent to have them take as purchasers.

4. Cases where the new estate of inheritance is grafted upon the heirs of his body, and the heirs are thereby made the stock of descent, rather than the ancestor.

These cases or exceptions we will now consider briefly.

Sec. 1449. CASES WHERE NO FREEHOLD IS GIVEN THE ANCESTOR OR ESTATE OF INHERITANCE TO THE HEIRS.—The first two exceptions to the rule may be considered in connection, as the reasoning is the same. If the estate given to the ancestor is less than a freehold, it is a mere chattel. There is no seizin of the fee in him, and this being in another, the words "his heirs" become words of purchase, indicating the persons who are to be seized of the freehold, and the first tenant takes but a chattel real, or possession for a term of years. If the life estate is given to the heirs, and the freehold to the ancestor, as where an estate of freehold is granted to A, remainder at his death to his heirs, or to the heirs of his body in fee, he would take an estate of freehold of fee simple, or fee tail, as the case might be. Whereas, if A grants an estate to B for five hundred years, remainder to his heirs, B takes an estate for five hundred years, and the heirs take the remainder in fee. When the first estate is less than a freehold, as for a term of years, the ancestor does not take the fee simple or fee tail. While if an estate is given to A for life, remainder to his heirs for

life, then there are two life estates, and the whole fee has not been granted to either the ancestor or the heirs, but is still in remainder, in such a case the word *heirs* becomes a word of purchase, and is not descriptive of the estate granted to the ancestor. The ancestor takes but a life estate, and the word heirs is not necessary to create such an estate.

Sec. 1450. WHEN THE EFFECT OF THE WORD "HEIRS" IS CHANGED BY EXPLANATORY WORDS.—It is a primary rule in the construction of wills, and devises therein made, as well as in the construction of a deed, to ascertain the intent with which it was executed, and to give effect to every phrase and clause if possible. So that where there is provision in the will or deed wholly inconsistent with a fee simple or fee tail vesting in the ancestor, then the *heirs* mentioned in such grant must be construed to take as purchasers, and the word "heirs" is not construed under the rule in *Shelley's Case* as describing the estate of the ancestor.*

Sec. 1451. WHERE THE NEW ESTATE OF INHERITANCE IS GRAFTED ON THE HEIRS, THE RULE DOES NOT APPLY.—When the freehold estate for life is given to the ancestor, with the remainder to the heir in fee tail, that is, the heir is made the stock of descent instead of the ancestor, the ancestor does not take an estate in fee or in fee tail,

**Perrin v. Blake*, 4 Burr. 2579; 1 Wm. Bl. 672; 1 Dougl. 348; Hargrave's Law Tracts, 489.

but simply a life estate, and the second taker secures the estate tail. In such cases, the grantor has in mind that the first tenant should have a life estate, and the remainder should go to his oldest son, and to the oldest son of the oldest son. The courts hold the words in such a grant are not descriptive of the estate given to the first taker, because the ancestor has taken the precaution to point out that the estate shall go to the son after the death of the first taker, and to the heirs of that son, and, therefore, the son is made the stock of descent and not the ancestor.†

Sec. 1452. OTHER EXAMPLES WHERE THE RULE DOES NOT APPLY.—The rule in Shelley's Case requires that the freehold shall be granted to the ancestor, and in the same instrument the fee simple or fee tail shall be limited to his heirs. Consequently if a freehold is given to A, and remainder to the heirs of B, in fee or fee tail, the heirs of B will take as purchasers.*

Again, in order that the rule in Shelley's Case may apply, the estate granted to the ancestor and the heir must in each case be both legal or both equitable estates. Thus, suppose an estate for life is given to A, and remainder to his heirs in trust. In this case the word "heirs" cannot be used as descriptive of the estate given to A, because the estate given to him is a legal estate,

†1 Coke Rep. 66; 2 P. Wms. 176; 17 B. Monr. 282; 13 R. Isl. 71.

*Coke, Litt. 378 a; 2 Coke 51; 10 Coke 50; 3 Coke 20; 7 Cranch 456.

and the remainder goes to his heirs in trust—an equitable estate. Hence it follows, that the word *heirs* cannot be descriptive of the estate given to the ancestor if the estate given the ancestor is different from the estate given to the heirs.†

Sec. 1453. THE RULE IN SHELLEY'S CASE IS ABROGATED BY STATUTE IN MANY OF THE AMERICAN STATES.—The rule in Shelley's Case, by reason of working out different from the intention of the grantor in many cases, has been abolished by statute in Maine, Massachusetts, California, Kansas, West Virginia, Connecticut, New York, Illinois, Missouri, Alabama, Kentucky, Minnesota, Tennessee, Virginia, Wisconsin and Michigan. In New Hampshire and New Jersey as to devises; in Ohio and Oregon as to wills, and in Rhode Island as to devises to one for life, remainder to his children or issue generally.*

†2 Term, Rep. 444; 62 Ill. 86; 133 Pa. St. 342; 45 Ia. 437; Tallman v. Wood, 26 Wend. 9; Curtis v. Rice, 12 Ves. 89.

*“When lands, tenements, or hereditaments are given by will, to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs.”—Rev. Stat. Ohio, Sec. 5968. See, also, Bowers v. Porter, 4 Pick. 205; Richardson v. Wheatland, 7 Metc. 172; 2 Washb. Real Prop. 607n.

CHAPTER V.

OF REVERSIONS AND REMAINDERS.

Sec. 1454. MEANING OF A REVERSION.—

A reversion is that estate which the grantor has after the particular estate which has been granted to another terminates. In other words, a reversion is that portion of the fee simple which remains in the grantor after the termination of a particular estate which has been carved out of it. If, for instance, the person having the fee creates a life estate, the life tenant is *vested* (clothed with) the estate, and under the feudal system he was given the actual possession, and was regarded as seized of the freehold during his life. The grantor was vested of the reversion; that is, he had a fee simple estate after the termination of the life estate. The whole estate had not been granted, and that which remained in the grantor to be re-enjoyed after the termination of the estate granted was called a reversion. The legal right of the grantor in the estate is as large before the intermediate estate terminates as after, but the *reversion* applies to the use of the land, of which he is deprived until the life estate terminates.* The life estate is called the *particular estate*.

*Co. Litt. 22b, 142b; Plowd. 151, 195. "If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for

Sec. 1455. MEANING OF A REMAINDER.—

"If at the same time with the grant of the particular estate he (the grantor) should also dispose of his remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is called, not a *reversion*, but a *remainder*. Thus, if a grant be made by A, a tenant in fee simple, to B for life, and after his decease to C and his heirs, the whole fee simple of A will be disposed of, and C's interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant; a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties."*

in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heirs will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only a part or *particula*, of the estate in fee. And during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his *reversion*."—Williams, Real Prop. 241. The statute De Donis, referred to in Chapter 3, secured to the grantor of an estate tail a reversion upon the death of the tenant in tail without heirs, until common recoveries came into vogue. Co. Litt. 22a.

*Williams, Real Prop. 242; 2 Bl. Com. 163.

Sec. 1456. HOW A REVERSION OR REMAINDER MIGHT BE CONVEYED AT COMMON LAW.—If a tenant in fee simple made a lease on his land for a term of years, his reversion, in law, is but a continuance of his former estate, the tenant by lease being regarded as a mere bailiff for the owner, and the grantor and his heirs have the right to dispose of their interest the same as before leasing. But if the owner in fee grants a life estate, or freehold estate, by the rules of the common law the life tenant takes the seizin, or is invested with the property, and is presumed as invested with the estate in fee simple during his life, that is, his life estate carries with it the freehold or feudal seizin, so that, the owner in fee simple could not make a feoffment (conveyance by livery or seizin) since his reversion is strictly incorporeal during the life of the tenant for life, the owner having no seizin, could give none, and to convey this incorporeal reversion the grantor, or owner of the fee simple, had to make a deed of grant.†

At the common law a feoffment or conveyance of real property in freehold was affected by livery of seizin. And that seizin meant the putting the tenant in actual possession of the land, and announcing in the presence of witnesses, what estate he took, and for whom he held in reversion or remainder. Under the old feudal system, when the lord granted an estate to A for life, and

†Co. Litt. 153a; Id. 366b; Shep. Touch 230; Williams, Real Prop. 242, 243.

put him in possession by livery of seizin, all other tenants were put out of possession, and it was then announced to all of the witnesses present, that A was given possession for himself for life, of the life estate, and possession for B in remainder, if such was the case, or possession for the lord as reversioner, if there was no remainder granted to any one.*

Sec. 1457. WHEN THE SEIZIN OF ANY SUBSEQUENT ESTATE MUST TAKE EFFECT.—The seizin of any subsequent estate must take effect immediately upon the termination of the precedent estate. Under the old feudal system there must be some one who had the immediate right to the seizin. The seizin could not be in abeyance. The exigencies of the feudal system required that the immediate seizin of the freehold should never be in abeyance, since upon the seizin of the land by tenants who held by reason of military service or rent, and allegiance to the lord paramount, depended the whole fabric of the feudal government. If the estate was in abeyance, and no one in possession, there would be no one to support the king. The right of a person to an estate depended upon his right to take immediate possession of it upon the termination of the preceding estate.†

As a result of the principle just stated, future estates could not be granted in fee, as the tenant by the future fee could not be put in possession of the title to the

*Co. Litt. 48, 49, 50.

†Co. Litt. 342b, Butler's note.

land without livery of seizin, and this was in another. Title never passed until possession was given; the title and possession being regarded as inseparable. Hence, a grant to A for life, remainder to B in fee, is good; but a grant to A for life, remainder after one year to B in fee, is void at the common law. The reason being, that the moment the life estate is ended there must be some one in being, with the right to take the immediate seizin, and if the person to whom you give the fee is not able to take possession of the fee the moment the life estate drops out, the grant is void as incompatible with the rule of the common law.* So that, it follows from this principle, that a grant of a freehold to take effect in the future can never be made.†

Sec. 1458. EVERY REMAINDER OF AN ESTATE OF FREEHOLD MUST HAVE A PARTICULAR ESTATE OF FREEHOLD TO SUPPORT IT.—The legal conception of a fee simple estate in lands is that it may be cut into ever so many parts, or estates, if each of such estates is supported by, or rests upon its predecessor and ready to come into being the moment the other is determined. Thus it is permissible to grant a life estate to A, remainder to B for life, remainder to C for life, remainder to D in fee, since each estate is supported by the preceding estate, and taking them altogether you have an entire fee simple.‡

*Plowden 29.

†Co. Litt. 217a; 5 Coke 94b.

‡“So long as a regular order is thus laid down, in which the

During the continuance of the particular estate of freehold, the freehold in remainder might be in abeyance, however, because the seizin of the particular estate was sufficient to satisfy the requirements of the feudal tenure. Consequently the remainder could be limited to take effect upon condition, or to vest in some person to be ascertained thereafter, and the uncertainty as to the happening of the event, or the ascertainment of the person, could continue so long as the particular estate continued; but the remainder must have become certain before or at the termination of the particular estate, or else it would lapse. Therefore, if an estate is given to A, remainder to the heirs of B, and B is alive, this is a good conveyance, so long as the particular estate continues. And if B should die before the tenant for life, thereby giving to his heirs the right to take (as he has no heirs while living) his heirs will take the estate on the

possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus a grant may be made at once to fifty different people separately for their lives. In such a case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seizin would be delivered, and all the rest are remainder-men; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease or forfeiture, or otherwise. The third grantee must wait until the estate of both the first and second shall have determined; and so of the rest."—Williams, Real Prop. 251. See, also, 2 Bl. Com. 167, 171.

death of A; but if B outlives A, then the remainder over is void, because the seizin would be in abeyance, there being no heir to take.*

Sec. 1459. OF VESTED AND CONTINGENT REMAINDERS.—When a remainder is granted to an ascertained and definite person it is called a *vested* remainder; thus, if an estate is granted to A for life, remainder to B in fee, B is given a vested remainder. While if the remainder is limited to take effect upon the happening of an uncertain event, or is granted to a person whose identity is uncertain, it is called, so long as this uncertainty exists, a *contingent* remainder. As soon as the uncertain event happens, or the identity of the person becomes certain, the contingent remainder becomes a vested remainder. A contingent remainder, because of the fact that it might never vest, was long regarded as illegal by the early common law. But about the time of the reign of Henry VI, it was adjudged that such a remainder was valid so long as the particular estate supporting it existed.†

A remainder is said to be vested in a person when he and his heirs have a right to the immediate possession of the estate upon the termination of the particular es-

*Co. Litt. 342, 378, According to the common law, a person has no heirs while living, the maxim being, *nemo est hæres viventis*, hence in the example given, if B dies before A, the heirs mentioned are determined and vested with the remainder in fee, but if A dies first there are no heirs of B, under the maxim, and the estate lapses.—Williams, Real Prop. 264.

†Year Book, 9 Henry VI, 24a; Williams, Real Prop. 264.

tate. And a remainder is nevertheless a vested one, though it may never be enjoyed by reason of the fact that the particular estate may outlast the remainder, as where the remainder is a life estate supported by another life estate. It is the uncertainty as to the estate vesting *in interest*, that characterizes a contingent remainder, and not the vesting of the possession.

If an estate is given to A for life, remainder to the heirs of B, and B is alive, the remainder is not vested, although B may have several children, they are only heirs expectant.*

Sec. 1460. HOW A GRANT IS CONSTRUED AS REGARDS CREATING A VESTED OR CONTINGENT REMAINDER.—Whether a remainder is vested or contingent depends upon the language creating the remainder. If in the creation of the remainder the conditional element is incorporated and made a part of the description of the remainder, it is contingent. If, however, after words giving a vested remainder, a clause is added divesting it upon certain conditions, it is still a vested remainder, though liable to be divested. Thus, for example, a devise to A for life, remainder to his children, but if any child dies in the life time of A, his share to go to the surviving brothers and sisters; this is a vested remainder, though the vested remainder of each child is liable to be defeated by his death. But if the devise is to A, remainder to the children who survive him, this remainder is not to a

*Co. Litt. 342, 378; Williams, Real Prop. 265, 266.

single one of the children now in existence, but to the children *who survive*, and it is uncertain who will survive, so that the remainder is contingent and does not vest until the death of A.*

When there is a gift over in a will to the right heirs, it is sometimes difficult to determine whether the *right heirs* designated are those persons who were his heirs at the time of his death, when the will took effect, or his heirs when the remainder over is ready for distribution, at the death of the first taker. The general rule is, that where a remainder is given over to the heirs of the testator, the testator means the heirs of himself in existence at the time of his death, unless there is something in the will which indicates beyond a question, that he means the heirs that are in existence at the time the life estate terminates.†

In such devises the rule as regards the exclusion of the first taker from sharing in the remainder is, that if it appears from the will that the estate given the first taker was all the estate that the testator intended he should have, then the estate goes to those persons who are the right heirs of the testator at the time of his death, and the first taker, although he may be a right heir at that time, is excluded.‡

*13 R. I. 71; 83 Pa. St. 462; 71 Mo. 371.

†139 Ill. 433; Tiedeman's Cases 301.

‡61 Pa. St. 111; 9 Beav. 376; 2 M. & K. 80; 3 Sim. 627; 8 Ves. 38; 3 M. & K. 235.

CHAPTER VI.

OF ESTATES UPON CONDITION.

Sec. 1461. WHAT IS MEANT BY AN ESTATE UPON CONDITION.—An estate upon condition is such that it will be created, enlarged or defeated, upon the happening of some uncertain event.

In regard to all estates upon condition, it may be said as to the condition upon which the estate is limited, that it must be a good or valid condition. What is meant by a good or valid condition is that it must be one not repugnant to the grant which has been made. Thus, if a man is granted a certain estate, and there are certain rights, powers and privileges, passing as incident to that estate, a condition that he could not exercise those rights or powers, would not be good or valid, since it would be repugnant to the grant.

Likewise, a condition to be good must not be contrary to, or in violation of good morals or public policy. And a condition which in its very nature is impossible of performance is void, as the courts will never require or expect a man to perform what is impossible.

Sec. 1462. CONDITIONS ARE DIVIDED INTO CONDITIONS PRECEDENT AND CONDITIONS SUBSEQUENT.—Conditions are divided into two classes: Precedent, and Subsequent.

When the condition is precedent the estate does not come into existence until the condition is performed.

Consequently it does not matter whether the condition is impossible, illegal or against public policy, it is always good in the sense that the estate upon condition precedent does not vest until the condition is performed. Therefore, if it is a condition that is impossible to perform, or the condition is illegal and void, the estate never comes into existence. Hence in considering a condition precedent it is unnecessary to ascertain whether it is against public policy or good morals, since such conditions must be performed before the estate vests; in other words, the condition precedent does not enlarge the estate, but simply prevents it from ever coming into the possession of the grantee.*

All that is necessary is to consider a condition precedent as one that is imposed upon the estate before it can vest, and when it is performed the estate vests.

A subsequent condition does not prevent the vesting of the estate, but it may restrict the enjoyment of the estate, and, in case it is not complied with, may terminate the estate by giving the grantor or his heirs the right to make a re-entry. Thus, every lease contains a condition that if the rent is not paid, the landlord may re-enter and take possession of the premises and terminate the lease, this is a condition subsequent. In this case, since the estate vests when the condition is subsequent, the tenant cannot be compelled to perform an impossible condition, or a condition that is against public policy to prevent being divested of his vested estate, and such conditions, if imposed are, therefore, void.

*3 Dallas, 817; 14 Mass. 495.

Sec. 1468. A CONDITION SUBSEQUENT MUST NOT VIOLATE ANY RULE OF PROPERTY.—What is meant by a rule of property is, that there are certain incidents to certain estates, which belong or inhere to those estates, since without them the estate could not be granted. They are essential to the existence of the estate, and when a condition subsequent deprives the owner of any one of these it is repugnant to the grant, and void. Thus, in the case of a fee simple absolute, there inheres in such a grant these things: 1. The right to alienate. 2. The right to devise by will. 3. The right, in case it is not devised or sold, to have it descend to his heirs. All these elements are essential to a fee simple absolute, and any condition in the deed or will which deprives the grantee of the fee simple absolute of these essential rights is void, because it *violates a rule of property*. We say it violates a rule of property when it is repugnant to the grant.*

It is not a violation of a rule of property, however, to restrict the power of alienation to a particular class of persons. Thus, the right of alienation may be restricted to the members of the family, the sisters of the grantor, and their children, and the like.†

The rule against restricting the power of alienation applies to involuntary sales, as well as to voluntary sales.

*Co. Litt. 228a; 20 L. R. Eq. 186; 62 N. Y. 462; 29 Mich. 78.

†L. R. 20 Eq. 186; 6 East 176; 15 N. J. L. 386; 11 Pa. St. 370.

So that estates cannot be placed beyond the reach of creditors by conditions in a will.*

Efforts are sometimes made in wills, to provide for spendthrift devisees by conditions that the estate granted shall not be liable to seizure by the devisees' creditors for the debts of the devisees. This cannot be done, as the right of the creditors to collect their debts by sale of the lands devised to the debtor cannot be taken away.†

*Where a man conveys land by deed or will, that is a *voluntary* sale or gift; if it is sold upon execution for the payment of the owner's debts, it is an *involuntary* sale.

†75 Iowa 343. In this case the testator granted certain lands to his son, declaring, "It is my will that he shall use, occupy and enjoy the lands during his natural life, but without the power or ability to mortgage the same." It was also provided that no creditor of the devisee should have the power to take the land upon execution. Execution was taken out by a creditor of the son, and upon its being returned unsatisfied, a petition was filed to reach the property or land on which he was placed. The court held that the son had a life estate, and that this life estate was subject to levy upon execution by his creditors.

But this is not the universal doctrine, and it has been held in several of the States, that a testator can, if he so chooses, create what is known as *spendthrift trusts*, making a provision for a spendthrift son or daughter, by placing the estate beyond the reach of such spendthrift and beyond the reach of his or her creditors, so that the grantee can have the profits of the estate from year to year. This is exception to the rule just stated, and seems to have been allowed simply to protect a testator wishing to provide for the exigencies of a relative incapable of looking after himself.—91 U. S. 716; 133 Mass. 170; 111 U. S. 247; Gray, Restraints upon Alienation, Sec. 24.

Sec. 1464. THE USE OF LAND MAY BE RESTRICTED IN THE GRANT.—The use to which the land may be put can be restricted or limited in the grant. Thus, the fee may be conveyed upon condition that it shall not be used for certain purposes, as, for example, the sale of intoxicating liquors, maintaining a slaughter house, boiler house, soap factory, livery stable, and the like. These restrictions or conditions on the use, are held good if the party who has a right to enforce them has any interest in their enforcement.*

It has been held in this class of cases, that where the fulfillment of the condition is no longer of any value to the grantor, when he is no longer interested in its performance, the violation of the condition will not work a forfeiture.†

*100 U. S. 55; 41 N. Y. 442; 101 Mass. 512; 14 Kansas 616; 25 O. St. 580. The case in the 100 U. S. 55, grew out of a grant to Colorado Springs, there being a restriction in the deed, that no building should be erected upon the premises for the sale of intoxicating liquors. This condition was violated, and the heirs of the grantor brought suit in ejectment to obtain possession of the premises. The Supreme Court held that the condition was a good one, the violation of which terminated the estate.

In putting a condition of this kind in a deed, it is well to couple it with a right of re-entry by the grantor or his heirs upon the breach of the condition. The reason for this is, that a violation of the condition does not terminate the estate, but simply gives a right to bring an action for breach of covenant, or breach of condition.

†83 Mich. 7; 75 Mich. 36; 100 U. S. 55. In the first case it appeared that a person had platted certain lands and had sold

A violation of the condition, does not of itself terminate the estate.*

Sec. 1465. AN ESTATE UPON CONDITION DISTINGUISHED FROM AN ESTATE UPON CONDITIONAL LIMITATION.—An estate upon condition is granted on the limitation, or condition, that the grantee do certain things, or refrain from doing certain specified things. If the grantee violates this prescribed condition, the grantor may re-enter and take possession. While an estate upon conditional limitation is one where the whole estate is given to the grantee absolutely, but upon the happening of a specified event it is to terminate absolutely. There is no re-entry necessary in this kind of an estate. The happening of the event is the end of the estate, and the fee goes immediately to someone else. For example, an estate is given to A so long as B remains in Rome. Here A has an absolute estate so long as B remains in Rome, but the

all the lots, but in each deed he put the proviso that no saloon should be erected upon the premises. After he had sold all of the lots a saloon was built upon one of the lots. The court held that this was a good condition so long as the keeping of the condition was a benefit to the grantor or his heirs, but since the grantor had sold all of the lots, he was no longer interested in the performance of the condition, and therefore could not bring an action to recover the lot. But this case does not preclude the bringing an action for the breach of the condition by some one other than the grantor, as one of the several grantees, where the deeds are properly drawn, and the condition is made to be in favor of the several grantees. In such cases a bill in equity may be filed by the grantees to enforce the condition.

*4 Kent Com. 127.

moment B returns from Rome the estate terminates, and no re-entry is necessary, since the estate ends on the happening of the event which limited its duration.

A proviso in a will that the estate devised shall terminate upon the happening of a certain event may be good as a conditional limitation, and void as a condition. For instance, land is devised upon condition that the devisee does not marry. Such a condition is void as against public policy, since the law favors marriages, and any such obstacle placed in the way of marriage generally is regarded as against public policy. But if the estate should be given to the devisee while he remains single, and to terminate upon his or her marriage, it is good as a limitation. The distinction between the two devises is, the distinction between a *condition* and a *conditional limitation*. In the first case the estate is held upon condition that the devisee does not marry, and that condition is void. In the other case the devisee is given an estate for an indefinite period, that is while remaining unmarried, and is not considered as a restraint upon marriage, since the will simply says so long as the devisee remains unmarried he shall have the possession of the estate, and upon marriage the estate terminates.*

Sec. 1466. A CONDITION IS TO BE DISTINGUISHED FROM A TRUST.—The courts in construing an instrument will sometimes construe the

*84 Me. 400. It occurs to us that this is a distinction without much difference, as the desire to retain the estate in either case would tend to restrain the devisee from getting married.

language used as creating a trust and not a condition at all. For instance, where land is given in a will to be used and occupied by a church, the court held that a *trust* was created for the use and benefit of the church, and that it was not held upon condition.*

Where land is deeded for public purposes, and to be used for that purpose only, upon condition that if it is not so used that the grantor or his heirs may re-enter, it is best to have the grant limited upon a *condition* rather than upon a *conditional limitation*. The reason being that a condition need not be performed within the rule against perpetuities, while the conditional limitation would be governed by such rule. Where an estate is granted upon a collateral limitation, the event which is to terminate the estate must happen within lives in being and twenty-one years thereafter. So that if a deed conveying land for public purposes, provides that the grantee shall hold the fee so long as he uses it for a public building, this is a conditional limitation, and must happen within the rule governing perpetuities, or the condition is void and the grantee will take the absolute title. But if the estate is limited upon a condition it is not within the rule against perpetuities.†

*84 Me. 386; Tiedeman's Leading Cases 233.

†59 Pa. St. 335; Tiedeman's Leading Cases 229. In this case the property was deeded to the Methodist Church and the deed provided that the premises should be occupied by the church, but upon failure to be used as a church, the grantor reserved the right to re-enter. It happened that the premises were occupied for several years as a church, when for some reason the Bishop

Sec. 1467. NATURE OF AN ESTATE GRANTED UPON CONDITION.—When an estate is granted upon condition, the grantor does not part with his entire interest; he has reserved to himself and his heirs the right to re-enter upon breach of the condition, this portion of the estate remains in him, and the grantee takes subject to this right of re-entry. The grantor may, by subsequent conveyance grant the interest he has reserved, and when these two interests are united the estate becomes a fee simple absolute. So that the right to re-enter is something more than an interest which belongs to an individual, it is a right incident to the land itself, being an interest which the grantor did not convey. The possibility of re-entry is created or reserved in the same instrument which creates the first estate.

Sec. 1468. NATURE OF AN ESTATE UPON CONDITIONAL LIMITATION.—An estate upon conditional limitation differs from an estate upon condition in several particulars:

1. When the grant is upon a conditional limitation, the whole estate passes from the grantor and nothing is reserved. Where there is a condition subsequent the right to re-enter upon breach of condition is reserved.

2. When the estate is upon conditional limitation, the happening of the condition specified terminates the es-

abandoned the church and appointed no one to hold services there. An action was brought to recover possession of the premises, and the court held, that the moment the grantee ceased to occupy it as a church, the right to re-enter accrued.

tate and no re-entry is necessary. Where the estate is held upon condition merely, the grantor may enter or not, just as he pleases, but if it is limited to cease upon the happening of a particular event, when the event happens it is the end of the estate.

3. In the case of an estate upon condition there are always persons in being, the grantor and grantee or their representatives, who can unite and pass a perfect title in fee simple; while in the case of an estate upon conditional limitation the whole estate passes to the grantee, and it being uncertain when the contingency may happen, there can be no one who can unite with the grantee and pass a perfect title.*

*In most cases the estate upon condition is to terminate upon the grantee dying without leaving issue him surviving. It seems to be a universal trait of mankind to desire that property shall be retained in the family. So that the grantor makes a will granting his land to his son in fee and to his heirs, and then puts in a proviso to the effect that if he dies leaving no heirs, or issue him surviving, the estate shall go to his brothers and sisters. This estate given in the first instance to the son, is an estate upon conditional limitation. The estate that goes over on the happening of the event, is called an *executory devise*. It is executed upon the happening of the event which terminates the first estate, that is, the failure of issue. It is a *devise* because it is an estate given in a will.

The third difference mentioned is the most important of the distinctions between an estate upon condition and an estate upon conditional limitation. It may be illustrated thus: Suppose A has the fee of land, and he grants this fee to B upon condition that he reside in a certain place. And there is a provision that A or his heirs may re-enter if B fails to perform the condition. A could then make another deed to B giving him the residue of the

Sec. 1469. THE ESTATE OVER IN A CONDITIONAL LIMITATION IS TO BE DISTINGUISHED FROM A REMAINDER.—The estate over in a conditional limitation is not a remainder. A remainder is necessarily a part of the whole. At common law a fee could not be limited upon a fee, because a fee comprises the whole estate, and if the whole estate is granted there would be nothing left as a remainder. A grant of an estate in fee upon a conditional limitation that the estate shall cease and go to a third person on the happening of an event, does not give the third person to whom the estate may go a remainder, but only a contingency of receiving the entire fee upon the happening of the event.*

estate which he holds, then B would have a perfect title. Suppose both parties die, B's heirs get his estate and A's heirs get the right to re-enter for breach of condition, and if all these heirs would unite in a deed to a third person he would get a perfect title. So that there are always persons in being who can unite and give a perfect title in the case of an estate upon condition. While in the case of a conditional limitation, the estate goes to A provided that if he die without issue the estate shall go to B and his heirs. A has the entire estate upon this conditional limitation. As it is not known whether A will die without issue, it is also uncertain whether B will be alive or dead when A dies. On the death of A without issue the estate goes over to the person then entitled to it; this person may not be in existence, since he may be born hereafter, consequently there are no persons in existence who can, by uniting in a deed, give a complete title in fee simple.

*8 Gray 143; 63 Am. Dec. 725; Tiedeman, Leading Cases 693. A devise to A for thirty years, remainder to B in fee, is

Sec. 1470. AN ESTATE UPON CONDITIONAL LIMITATION DISTINGUISHED FROM AN ESTATE TAIL.—An estate upon conditional limitation differs from an estate tail in this: that in an estate tail the ancestor has not parted with his entire estate, and upon failure of the designated heirs, the estate reverts, while in a conditional limitation, as we have seen, the ancestor or grantor has parted with his entire estate.

Sec. 1471. MEANING OF AN EXECUTORY DEVISE.—An executory devise is an estate given by will upon a conditional limitation, and which interest

an illustration both of the *particular* estate and a *remainder*. In this case the particular estate at the end of thirty years ceases by limitation. It is a definite and specified part of the fee; the remainder, which is the part of the fee left after carving out the estate for years, begins when the particular estate drops out. The particular estate may also be for an indefinite period, as a grant to A until B returns from Rome, and then to B in fee, here A has a life estate liable to be cut short by B's returning from Rome, and B has a remainder in fee.

But a grant to A and his heirs until B returns from Rome, and then to C in fee, does not give any remainder to C. A has a fee simple estate upon conditional limitation. The difference is, that in the one case you have given to A nothing more than a life estate, which is likely to be terminated upon B's returning from Rome; in the other case you have given A a fee simple liable to be terminated upon the happening of the event. In the first case there was a remainder over because A could not live forever, and the estate could only last so long as he lived; in the last case there is no remainder over, since unless B returns from Rome, A and his heirs have the fee, and what goes to the third person, if anything, is not a remainder, but the fee.

goes over to a third person upon the happening of the event which terminates the first estate created by the will.

Since the tenant taking the estate upon the conditional limitation could not defeat the executory devise, or because the power to alienate is repugnant to a *base* or qualified fee, it is held that, if a testator gives and devises a qualified or base fee, and then gives the devisee power to alienate the land, he thereby defeats the executory devise over. That is, if by giving the right to sell, the testator has given the fee absolute, the courts hold that he cannot, also, provide for its termination, as this would be repugnant to the grant.*

It was a rule of the early common law, at first strictly adhered to, that if a fee absolute was granted, it could not be limited by any condition in the grant in derogation of the fee. But in 1620, in a case reported in 2 Croke 590, the court held that an estate could be granted upon a conditional limitation. The facts in the case were: land was devised to A and to the heirs of his body, provided, that if he died leaving no issue him surviving, the estate should go to B. So far as the first part of this devise is concerned, it would apparently create an estate in fee tail general, but the proviso was that if he die leaving no issue him surviving, then the estate should go over to B. The court held that in such a case, the expression, "dying without issue him surviving" meant an indefinite failure of issue. That is, it is an ex-

*5 Mass. 500; 10 Johns. 19; 100 N. Y. 287.

tion of the line, when there is no longer heirs of the body in existence, then the estate goes over. While if it means a definite failure of issue, then it is not an estate tail. In this case, after the death of the testator A went into possession and suffered a common recovery. He had converted what he assumed to be an estate tail into a fee simple. After A's death the executory devisee, that is the one entitled to the estate under the terms of the grant upon A's dying without issue him surviving, brought an action to recover the property. The first question was, did this grant create an estate tail? If it did, it had been barred by a common recovery and converted into a fee. As we have seen the tenants in tail are barred by a common recovery, because their ancestor has received a judgment for the value of the land from or against his grantor, which afterwards bars and estops him and his heirs claiming any interest in this land. The judgment is also a bar against his descendants claiming any interest in the lands since the judgment is regarded as binding upon the party and his privies. But the court held that an *executory devisee* was not a party to the proceedings at all, either directly or inferentially, and consequently the proceedings in common recovery did not bar his right to the estate, if the first taker died without issue.

While at the early common law, and yet you cannot make a grant in fee, and at the same time annex conditions which are repugnant to the grant, as to grant a fee absolute and at the same time provide that the grantee shall not alienate the estate granted, yet it is

held to be permissible to grant a fee and provide that if the first taker dies without issue, the estate granted shall terminate and the fee go over to a third person. If such an estate is created by will, we have seen that it is termed an *executory devise*, while if it is created under a deed, it is called a *shifting* or *springing use*. That is, the creation of such an estate could not be made by a direct conveyance at common law, and was made by way of a trust or use, by which land was conveyed to A for certain specified uses, and provided that if a certain event happened the particular use or trust should cease, and the lands be held to another use or trust. Thus if lands are granted to A and his heirs, for the use of B and his heirs, but in case A should die under age, then to the use of C and his heirs, the death of A under age, terminates the first use, and it shifts to C.

If land is conveyed in a deed to B and his heirs, and then upon the happening of a certain event it is to go over to a third person, such a condition would be void, because of the rule that you cannot limit a remainder upon an estate in fee simple.*

Sec. 1472. EFFECT OF A CONDITIONAL LIMITATION WHEREIN THE ENTIRE ESTATE IS NOT TO GO OVER TO A THIRD PERSON.—We have seen that if an estate is granted to A and his heirs in fee, upon the unconditional limitation that if he dies without leaving any heirs him surviving (that is, a definite failure of issue, since if it was

*118 Ind. 150; Tiedeman, *Leading Cases* 311.

construed as an indefinite failure of issue it would be void as contravening the rule against perpetuities), the estate shall go over to B, this limitation is good under the case decided in 1620. But suppose instead of giving the entire estate to B, the grant is, that so much of the estate as remains undisposed of shall go over to B. The question then is, what estate goes to B? The grantor has given to A the fee simple and also given him the power to convey the fee simple absolutely, whether he leaves any issue or not, but provides that if A does not sell it all what remains shall go to B.

The English cases held that this was nevertheless a good limitation, and this seems to be the law of the English courts now. But in America the weight of authority is, that the executory devise over, in such a case is void.*

*The first case decided upon this point was in the 5 Mass. 500; and that was followed in the 10 Johns. 19, decided in 1813. These two cases have been followed by a great number of American courts. The case in 5 Mass. 500, was based upon the case of Attorney General v. Hall, Fitzgiven, Rep. 314. In which case the testator left both real and personal property to his son. The real property was given to him under words which created an estate tail, without question. Now, under the rule of property that where both real and personal property are conveyed or devised by the same words, and such words create an estate tail as to the realty, the devisee takes the personal property absolutely. The court held that the language used created an estate tail in the land. The devisee suffered a common recovery and converted his title into a fee simple, and then died leaving a large part of his personal property unsold. The will provided that if he should die without issue the property should go to the Goldsmith

Sec. 1473. HOW A WILL MAY BE DRAWN SO AS TO GIVE THE DEVISEE THE RIGHT TO SELL AND YET HAVE THE REMAINDER GO TO A THIRD PERSON.—The question

Company, of London. The son had made a will, making his widow his executrix. The Attorney General for the use of the Goldsmith Company filed a bill for an accounting of the personal property, and the question was what estate did the first devisee take under the will; and what interest, if any, went to the Goldsmith Company in the personal property that had been devised to the son, the son having died leaving no issue. The court held, first, that the devisee took an estate tail in the real property, and having suffered a common recovery had thereby converted it into a fee simple; second, that taking an estate tail in the realty gave him the personal property absolutely, and any restriction on such a gift was a violation of the rule of property as repugnant to the grant, and therefore void.

The Massachusetts court commenting upon this case said, since the power to dispose of the personal property was given, the executory devise over was void. But that was not the decision; which was that when the devisee was given the property *absolutely*, the executory devise was void. It was not void because the first devisee was given the power to sell, but because the power to sell was incident to the estate granted, and he could not be deprived of it by any limitation.

When the case of 10 Johns. 19, was decided, the court did not have before them the case of Atty. General v. Hall, but had before them a case in the 2d Vesey, in which this case was commented upon. As a result of this misunderstanding of the language of the court in the Fitzgiven case, the American courts have decided, and the decision is followed by the weight of authority, that where an estate is devised in fee, and then the devisee is given the power to dispose of it in fee simple absolute, and a provision is made that what is left shall go over to a third person, this proviso is void, and nothing will go over, the first devisee taking the absolute fee.

arises as to how to draw a will allowing the devisee the power of disposition and yet have the remainder of the estate go over to a third person upon the happening of an event. We have seen in the last section that this cannot be done under the ordinary limitation by the weight of American authorities. This may be done by giving the devisee a life estate, with remainder to his children, with power to alienate in fee, provided that if he dies without issue, the remainder over to his brother's children.

It being held, by the weight of authority, that an executory devise after a life estate, coupled with power to alienate in fee, is good.*

To carry out the intention of the testator and save the executory devise over, the court will, when the language will permit, cut down a devise in fee to a life estate with power to alienate. This will be done to effect the purpose of the testator, where possible, since if compelled to treat the first gift as a fee simple, the executory devise limited upon it is void.†

The condition upon which the property is to go over to a third person, must be a good one, and not void for any reason.‡

The rule of property, that where an estate in fee simple is granted it carries with it the right to alienate it by deed or will, which cannot be limited by a condition

*153 Mass. 542; 25 Am. Dec. 614; 153 Mass. 132; 25 Am. St. Rep. 616; 102 Mich. 148; 88 Ky. 238; 116 Pa. St. 490.

†132 N. Y. 2; 41 Hun 125.

‡6 Chan. Div. 1.

curtailing these incidents is not enforced by the Scottish law. § And the rule is sometimes ignored where more important rights intervene, as where the courts have been compelled to sacrifice the rule of law or infringe upon human liberty, they have sacrificed the rule of law to protect liberty.

Sec. 1474. EXECUTORY DEVISES AND THE RULE AGAINST PERPETUITIES.—Executory devises or interests, as they are called, in their very nature, by putting off the vesting of an estate, tend to perpetuities, since they render the fee simple inalienable during the period for the happening of the event or contingency. It being impossible to determine who shall receive the estate over, at any particular time, it is impossible to convey a perfect title, and this ties up the estate so as to prevent free alienation, that is, it tends to perpetuities. It therefore became necessary at common law to fix some permanent rule prescribing the period or length of time that might be stated for the happening of the event or contingency, so that limitations within this rule would be good, and those without it, void.

This limit by the common law came to be fixed as a period of a life or lives in being and twenty-one years thereafter. This rule has been established by judicial decisions, but is as authoritative as any statute; though it is now substantially adopted as the statutory rule in the various American States. The common law courts

§1 Scottish App. Cas. 592.

had decided that a grantor could not limit a fee upon a fee, but that he might grant a fee and then provide that the fee should terminate upon the happening of a certain event and go over to a third person. Then they established the rule that the event which would terminate the fee, must be an event which would happen within a certain time, and this time came to be judicially fixed at an early date, as a life or lives in being and twenty-one years thereafter. So that an estate can be given to A for life, remainder to B for life, then to C for life, and so on indefinitely, and then to X and his heirs in fee, provided that if X dies leaving no issue, then the estate should go to Z. At the common law you could grant the estate for as many lives as you saw fit and twenty-one years thereafter.* To which may be added the period of gestation, should gestation actually exist.

*“Executory interests other than those in remainder after or engrafted on an estate tail, must be so limited that, from the first moment of their limitation, it may be said that they will necessarily vest, in right, if at all, within the period occupied by the life of a person in being, that is, already born or *in ventre matris*, or the lives of any number of persons described and in being, ‘not exceeding that to which testimony can be applied to determine when the survivor of them drops,’ and by the infancy of any child born previously to the decease of such person or persons; or the gestation and infancy of any child *in ventre matris* at that time, or within the period occupied by the life or lives of such person or persons in being and an absolute term of twenty-one years, afterwards, and no more, without reference to the infancy of any person; or within the period of an absolute term of twenty-one years without reference to any life.”—Smith on Executory Interests, Sec. 706. See, also, *Beard v. Westcott*, 5 Taunt. 394; *Cadell v. Palmer*, 1 Cl. & Fl. 372.

Sec. 1475. AN EXECUTORY INTEREST TO BE GOOD MUST NOT CONTRAVENE THE RULE AGAINST PERPETUITIES.—In order that the condition may be good, which creates an executory interest, it must necessarily happen within the prescribed period fixed by the rule against perpetuities. So that if there is any possibility that the happening of

“The law has fixed the following limit to the creation of executory interests: It will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled; and if no lives are fixed on, then the term of twenty-one years only is allowed.”—Williams, *Real Property*, 318. “With regard to future estates of a destructible kind, namely, contingent remainders, we have seen that a limit to their creation was contained in the maxim, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person: the latter of such remainders being absolutely void. This maxim, it is evident, in effect, forbade the tying up of lands for a longer period than can elapse until the unborn child of some living person should come of age; that is, for the life of a party now in being, and for twenty-one years thereafter—with a further period of a few months during gestation, supposing the child should be of posthumous birth.” *Id.*

See, also, 15 Pick. 104; 41 Mich. 562; 50 Mich. 428; 8 Mass. 37; 16 Johns. 399; 43 N. Y. 303; 14 Allen 572.

The rule governing perpetuities was first definitely settled in the case of the Duke of Norfolk, 3 Ch. Cas. 1; 2 Chan. Rep. 229, decided in 1685. It is governed by statute in most of the United States.

the event will lap over this limit for any length of time, it is void.*

*68 Mich. 355; 3 Gray 143; Tiedeman, Leading Cases 393.

"When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity."—Williams, Real Prop. 319; *Newman v. Newman*, 10 Simons 51; *Jarman on Wills* 233.

In addition to the limit already mentioned, another act of parliament was passed in the reign of George III (39 and 40 Geo. III, c. 98), forbidding the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor or settlor, or during the minority of any person living or in *ventra sa mere* at the death of the grantor, or during the minority only of any person who under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. This statute was passed to prevent an accumulation of income as made by Mr. Thelluson, providing that the property should be allowed to accumulate during the lives of all his children, grandchildren and great-grandchildren, who were then living at the time of his death, for the benefit of some descendant living at the death of the survivor. See, *Thelluson v. Woodford*, 4 Ves. 221. Statutory provisions limiting the accumulation of income from property of a like character have been enacted in a number of the American States. *Vail v. Vail*, 4 Paige 317; *Purd. Dig.* 1460.

Sec. 1476. AN ESTATE UPON CONDITION DOES NOT VIOLATE THE RULE AGAINST PERPETUITIES.—An estate upon condition does not violate the rule against perpetuities since there is always some one in being, who by uniting in a deed, can convey the fee simple to the land affected by the condition.*

Sec. 1477. WHEN EXECUTORY DEVISES WILL BE HELD VOID.—The more common cases of executory devises which are held void as contravening the rule against perpetuities are those where property is given to A, remainder over upon the indefinite failure of issue. We have seen that if the estate over is given upon definite failure of issue, it does not violate the rule.†

*Suppose A grants the estate to B upon certain conditions; the next day, or any time, B can go to A and say, I want to be released of that condition, and A has the power to release him from the operation of the condition, giving him an absolute fee simple. It is not required that the condition must be performed within lives in being and twenty-one years afterwards, since there is always some one in being who by uniting in the deed can convey a perfect title. But where the estate is granted upon a conditional limitation, there is no one in being who can join and pass a perfect title, therefore the event must be one which will happen within the period fixed by the rule governing perpetuities.

†26 Wend. 229; 29 Pa. St. 118; 76 Va. 140. "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he dies without issue, or lawful issue living at the time of his death, etc. An indefinite failure of issue is the

Suppose an estate is given to A, and his heirs in fee provided that if A dies without issue him surviving, it shall go over to B. What does such a limitation mean? Does it mean that if A dies without children or issue, the estate shall go to B, or does it mean that the estate goes over only when the line of issue from A shall have become extinct, which might not be for an indefinite number of generations? Now if it means the former, it is a *definite* failure of issue that is meant, if it means the extinction of the line of direct issue, then it is an *indefinite* failure of issue, because the time when the line of issue shall become exhausted is exceedingly indefinite, and may continue for centuries. The death of A, on the other hand, is definite, and is bound to occur within a fixed time. The common law courts have held that such a devise means an indefinite failure of issue, and that the grant is void; unless there is something else to indicate that a definite failure of issue was intended.

So, if the condition upon which the estate is limited, is against public policy, or contravenes good morals, it is void. The condition must be one which the law will sanction and enforce.

Sec. 1478. HOW A CONDITIONAL LIMITATION IS CREATED.—The usual words creating a conditional limitation are, “as long as,” “while,” “during,” or “until,” and the like, yet the use of these words

period when the issue of descendants of the first taker shall become extinct, and when there is no longer any issue of the line of the grantee, without reference to any particular time or any particular event. *Huxford v. Mulligan*, 50 Ind. 542.

is not conclusive. The court will gather the intent of the grantor from the whole instrument.*

Sec. 1479. EFFECT OF A BREACH OF THE CONDITION.—In the case of a breach of the condition, where the grantor has reserved the right to re-enter, upon re-entering he takes the estate as of the time he granted it. That is, the testator takes the same estate back which he granted, and it is relieved of the dower interest or any estate by courtesy or other estate which could otherwise attach to it. But if an estate upon conditional limitation is given to A, and he marries and has no children who can inherit, that is, dies without issue, does his widow have dower? The estate which he had in the land terminates upon his dying without issue, yet the courts hold in such a case, that the dower interest will attach to the estate, because it was an estate in *fee*, and having attached to such an estate, it was not destroyed when the estate terminated, as in the case of a condition.

Sec. 1480. THE RULE AGAINST PERPETUITIES STATED.—The rule against perpetuities may be stated as follows: No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.

The common law rule governing perpetuities is, that the condition must happen within a life or lives in being and twenty-one years and the period of gestation thereafter.

*29 Pa. St. 118; 76 Va. 140.

In Wisconsin, New York, Minnesota, and perhaps some other states, the rule against perpetuities has been modified by statute so that the condition must happen within the period of the lives of two persons in being at the time of the creation of the estate. § Where the common law rule has not been modified by statute, the rule is the same on both sides of the Atlantic.*

Sec. 1481. GRANTS THAT ARE NOT REPUGNANT TO THE RULE.—A vested interest is never repugnant to the rule against perpetuities, since it is not subject to a condition precedent, and the person who has the vested interest has also the right to alienate it.

So if a contingent remainder *must* become a vested remainder within twenty-one years after lives in being, such a contingent remainder will be good. †

If the remainder is vested it is good, although the contingency may not happen which terminates the particular estate within lives in being, and twenty-one years thereafter. ‡

The conditions upon which the future estate may be terminated are as numerous and varied as the ingenuity of man may devise. A common condition is the failure

§ *Manice v. Manice*, 43 N. Y. 303; 125 Ill. 399; *Tiedeman, Leading Cases* 423.

**St. Amour v. Rivard*, 2 Mich. 294; *Jackson v. Phillips*, 14 Allen 572; *Hawley v. Northampton*, 8 Mass. 37; *Anderson v. Jackson*, 16 Johns. 399; 102 Mich. 510.

†*Irish Term Rep.* 249; 19 Ch. Div. 520.

‡19 Ch. Div. 520; 2 P. Wms. 28; 41 Mich. 572.

of issue, and this may be a definite or indefinite failure of issue.

A limitation over upon the condition that the grantee dies without issue, or issue him surviving, was held to mean an indefinite failure of issue, making the limitation over void, except where it was saved by the peculiar incidents of an estate tail;§ and where there is some-

§In the case of a devise to A and his heirs, and if he die without issue, remainder to B, if the terms of the will were strictly followed, A would take an estate in fee simple, which would render the limitation to B, void as a remainder (because a remainder cannot be created after an estate in fee simple), and void also as an executory devise, because it would transgress the rule against perpetuities, as restricting alienation until after an indefinite failure of issue. But as the testator has shown an intention to benefit the heirs of A, as also the remainderman, courts restrict the estate limited to A, to an estate tail, upon which the limitation to B in remainder is good, as the failure of issue is the regular limit to an estate tail, and it takes effect as a remainder under the operation of the rule that wherever a limitation can take effect as a remainder, it shall never operate as an executory devise, while the rule against perpetuities is, at the same time, observed, because the right to suffer a common recovery is the inseparable incident to an estate tail, and the restriction upon alienation is, therefore, determinable at the option of the tenant in tail. Thus the rule against perpetuities is, in this instance, avoided by decreasing the estate of the devisee from a fee simple to an estate tail. . . . On the other hand, an estate to A for life, and if he die without issue, remainder to B, is, for the same reason, increased to an estate tail, for, as an executory devise, the limitation to B would be equally void as in the last case, and for the same reason.”—Williams, Real Prop. 6th Am. Ed. 215n, citing *Doe v. Ellis*, 9 East 382; *Romilly v. James*, 6 Taunton 263; *Eichelberger*

thing else in the devise or grant to indicate that the ancestor had in mind that the failure of issue, should mean a failure of issue at the death of the first taker, that is, a definite failure of issue.* This construction upon the phrase "dying without issue," or "without issue him surviving," was modified in England by act of Parliament (Stat. 7 Will. IV. and 1 Vict. c. 26, s. 29), to mean when used in a will, a want or failure of issue in the lifetime or at the death of the party, and not an indefinite failure of issue. And the like modification of the common law holding has been made by statute in many of the American States.†

v. Barnitz, 9 Watts 450; Soday's Case, 9 Coke 127b; Langley v. Baldwin, 1 P. Wms. 759; Atty. Gen. v. Bayley, 2 Brown Ch. 540.

"It is well settled that a devise in fee will be restricted, and a devise for life enlarged to an estate tail, by a gift over in case the devisee die without issue, unless there is something to justify a different construction."—Id. Citing, Clarke v. Baker, 9 S. & R. 434; Deboe v. Lowen, 8 B. Monr. 616; Moorhouse v. Cotheal, 1 Zabriskie 480.

*"When, however, there is anything in the words of the gift or limitation, or in the context, to rebut this construction, and show that the testator meant a failure of issue in the lifetime of the first taker, instead of an indefinite failure, it will be rejected, and the limitation over construed as an executory devise in defeasance of a fee simple, and not as a remainder sustained by an estate tail."—Williams, Real Prop. 6th Am. Ed. 215n, citing Pells v. Brown, Croke Car. 590; Porter v. Bradley, 3 Term. 143; Heerd v. Horton, 1 Denio 165; Hall v. Chaffee, 14 N. H. 215.

†Where the will contains a proviso that if the devisee dies without issue, or issue him surviving, or the like expression,

The limitation over on the condition of the grantee *dying without issue*, when the grant to the first taken

there is some conflict as to the construction to be placed upon the language used. Thus in *Edwards v. Edwards*, 15 Beavan 357, the Master of the Rolls held that the expression "dying without issue," in such a case meant the dying of the grantee within the lifetime of the testator without issue; that is, the expression meant the same as if the testator had said I give lands to A and if he dies to B, the intention being that if A died before the will took effect—before the testator's death—then the estate should go to B. Some American authorities follow this case. But in England, the rule is now settled that a gift to A, and provided A dies without issue, to B, means that if A dies at any time without issue, the estate goes to B, that is an indefinite failure of issue, and not a definite failure of issue by dying in the lifetime of the testator. And this is the weight of the American authorities. 153 Ill. 368; 7 H. L. Rep. 408; 11 U. S. 526; 9 Allen 516; 32 Mich. 47. To avoid this construction upon the words "dying without issue," by the courts New York State adopted a statute which has been followed in Virginia, Indiana, Michigan, Missouri and perhaps other States, providing that when a remainder shall be limited to take effect upon the death of any person without heirs, or heirs of his body, or without issue, the words *heirs* or *issue* shall be construed to mean heirs or issue living at the death of the person named as ancestor. 3 Barb. 385; 3 Wend. 503; 2 Paige 30. The court held that this statute meant that if a grantee died at any time before or after the testator without issue, the estate went over. 110 Mich. 237; 32 Mich. 47; 3 Barb. 385. But notwithstanding this statute the New York courts have turned back and hold that this expression means that if the donee or grantee dies before the testator dies, without issue, then the estate goes over, otherwise not. 105 N. Y. 89; 131 N. Y. 55; Tiedeman, Leading Cases 408. See *Gray v. Perpetuities*, 251; *Champlain*, suspension of power of alienation; 113 N. S. 340.

is a fee, is held to create an estate tail, as is also the case when the first taker is given a life estate, in the one case the grant being restricted, and in the other enlarged, so that the estate over thereby becomes a remainder, and the rule against perpetuities is not violated since the tenant in tail has the right to bar the entail at any time, and thereby convert the estate into a fee simple.*

The contingency may be postponed for any number of lives in being, at the common law, and the persons designated need have no interest in the estate.† The only limitation suggested by the courts, independent of statutory limitations, is that the number of lives must not be so great, that it will be impossible to determine by evidence when the last survivor shall die.

A child in its mother's womb, in *ventre sa mere*, is considered as born, if it will be for its benefit to be so considered, hence the limitation fixed by the rule may include the period of gestation.‡

The term twenty-one years may be taken in gross, without any reference to the infancy of the person to take the estate. In other words you can within the rule against perpetuities, suspend the power of alienation during any number of lives in being and for a period of twenty-one years thereafter, by having the estate go to

*Eichelberger v. Barnitz, 9 Watts 447; Teton v. Teton, 4 Barbour (S. C.) 419.

†4 Ves. 227; 11 Ves. 112.

‡2 H. Bl. 399.

trustees to be then distributed among the beneficiaries.† This term of years begins to run not from the execution of the will, but from the time the will takes effect, that is, at the testator's death.‡

If the interest begins within the limit it is not obnoxious because it may extend beyond that period.

If the executory or future estate is too remote it is simply void, and the first estate becomes free from such limitation. Thus if an estate is given to A for life, remainder to his children who arrive at the age of twenty-five, and at the time the testator dies, A to whom this estate is given, is unmarried, the remainder over is void as being too remote. Since the condition is void the son takes the life estate, and the remainder over goes to his heirs.*

If the prior estate is for years or for life, the remainder over in case of the condition being void, goes to the heir or residuary legatee, depending in part upon the statute, and in part upon the construction of the deed or will.§

If the contingency upon which the future estate is to vest is stated in the alternative, it may be good in part and bad in part. Thus if a gift as to A for life, remainder to his unborn children if they reach the age of twenty-five, remainder to the children of B, it is void,

†1 Cl. & Fl. 372; 10 Bing. 140; 7 Cranch 456; 3 P. Wms. 362.

‡3 Hare 1; 98 Mass. 65; 10 Hare 106.

*3 Gray 142; 102 Mich. 510; Tiedeman, Leading Cases 418. §36 Md. 163; 4 Ves. 732; 20 Wend. 457; 6 Paige Ch. 600.

because none of the children may reach the age of twenty-five within twenty-one years after A's death. But a gift to A, and if he dies without issue, or none of his children reach the age of twenty-five, remainder to the children of B, is good if he dies without issue, but is bad if he dies with issue under twenty-five. The reason being that the event of his dying without issue necessarily happens at the end of a life in being, while the other alternative, that the children shall reach the age of twenty-five, may not occur within twenty-one years after his death, and therefore if he dies leaving children under twenty-five it is void, if he dies without issue it is good.‡

‡2 H. Bl. 358; 11 Hare 372; 12 Cl. & Fin. 559.

CHAPTER VII.

LIMITATIONS TO CLASSES OF PERSONS.

Sec. 1482. GIFTS TO CLASSES OF PERSONS EXPLAINED.—A gift or devise may not be made to a particular person, but to a class of persons. A gift is said to be to a class of persons when it is to all those who shall fall within a certain category or description denoted by a general or collective formula, and who, if they take at all, are to take one divisible sum in certain proportionate shares. Thus a devise to the children of A, or to the children of A who shall arrive at the age of twenty-one, is a devise to a class.*

Sec. 1483. IN DETERMINING THE VALIDITY OF A DEVISE TO A CLASS IT IS THE SITUATION AT THE DEATH OF THE TESTATOR WHICH WILL GOVERN.—To deter-

*L. R. 5 App. Cas. 714. In this case the devise was to all the children who should reach the age of twenty-one, and in the event that any of such children should die before attaining the age of twenty-one, to those children of such deceased child who should attain the age of twenty-one. The question was whether this devise was too remote to be valid. There was first a devise to a class, to all the children who arrive at the age of twenty-one, so far the devise was good, as all the children must attain the age of twenty-one within the rule, after the death of the testator. But the second provision as to the grand-children would be too remote, as it might be more than twenty-one years after the death of the testator, and this would violate the rule against perpetuities.

mine whether a devise to a class is good or not, as regards the rule against perpetuities, the situation at the time of the death of the testator, that is, the time the will takes effect, is to govern. So that if all the members of the class are to be ascertained, and the share of each to be determined within the time limited by the rule, from the death of the testator, the devise is good; if not, it is bad.*

Limitation to grandchildren, or children of a living person as a class, when they shall attain an age greater than twenty-one years, is bad for remoteness, unless someone in the class is of the required age at the testator's death.†

When the limitation is made in a marriage settlement to children beyond the term of twenty-one years, the limitation is too remote. Thus if the settlement provides that the property shall be used for the benefit of the father or mother during their lives, and then to the children who arrive at the age of twenty-two, this is bad for remoteness, unless at the death of the first taker there is a child of the required age.

When the devise is confined to the grandchildren who are in being at the testator's death, it is good at whatever age they take. The reason for this is, that

*7 Ch. Div. 698. Thus a devise to A, and his issue, and if A dies without issue, to the issue of B who shall attain the age of twenty-one. The devise is good because B's youngest son must attain the age of twenty-one within twenty-one years from B's death.

†102 Mass. 5; 123 Mass. 120; L. R. 6 Eq. 319.

the devise is given to a class that is in being and known and determined, and as they are in being, the limitation is simply for lives in being and within the rule.*

When the gift is to such grandchildren, or other class as shall reach a particular age, and one or more of that class has reached the required age at the time of the testator's death, the class is closed, and the devise is not too remote. But no person can be included in the class who is not in being at the time of the testator's death.†

When a legacy is to children or grandchildren as a class after the prior estate, the gift is to the members of the class in existence at the time of the death of the first taker, and not at the death of the testator. Thus where A makes a will giving to his son John certain land for life, remainder to his children; and when the testator dies John has two children. Here the children that take are not the children in existence when the testator dies, but the children in existence when the estate should be distributed, and that is when John dies, so that all of John's children will take at his death. While if the grant had been to John's children who arrive at the age of twenty-five, and one of his children had been alive and of the required age at the death of the testator, the class would have been closed, and those two children would have taken.‡

*3 M. & K. 550.

†10 Ch. Div. 204.

‡1 Brown's Ch. Cas. 542; 1 Cox 68; L. R. 10 Chi. Div. 262. This distinction is important, and if you want to provide for unborn children of a child of the testator, at the testator's

When the gift is to the children of A who shall reach the age of twenty-one, and if any child of A shall die under the age of twenty-one, leaving issue, to such issue on attaining the age of twenty-one, the latter taking the parent's share, there is a gift to a class composed of the children and grandchildren of A at twenty-one years of age. The maximum number of shares into which the gift may be divided is the whole number of A's children, but if A's children are under the age of twenty-one, the minimum number cannot be known, for such children may die before reaching the age of twenty-one, leaving issue who will not reach the age of twenty-one within the limitation, so that the devise is bad as contravening the rule against perpetuities. Therefore, when a devise is made to a class, the members of that class must be determined within the time fixed.*

Sec. 1484. RULES FOR DETERMINING WHETHER A DEVISE TO A CLASS IS INVALID.—To ascertain whether or not a devise to a class is bad, the following rules have been formulated:

1. An executory devise is bad unless it be clear at the time of the death of the testator that it must, of necessity, vest in some one, if at all, within lives in being and twenty-one years thereafter.†

death, you cannot do so by a provision that the property shall go to "my son's children," since this is a gift to those children of the son who are in existence at the time of the testator's death and does not include those who may be born thereafter.

*2 Merrivale 362; 22 Beav. 591; 26 Beav. 128; 11 Ch. Div. 555.

†12 Cl. & Fin. 546.

2. The will of the testator must be construed in the first instance without any reference to the rule against perpetuities, and having thus ascertained the true construction of the instrument, you are to apply the rule against perpetuities and ascertain if any of the provisions in the will are obnoxious to the rule.†

In America, the rule above stated may be considered as modified, so that the prevailing doctrine is, that you are to ascertain the intent of the testator, and if the will is capable of two interpretations, one of which would make the will void as being illegal, and the other not, the courts are to give it that construction which will make it legal. That is, the courts will favor that construction which will make the provisions of the will legal, as that is supposed to have been the real intention of the testator.

3. If the devise is to a single member constituting the class, who may by possibility be a person excluded by the rule against perpetuities, then no person whatever could take under it, because the testator has expressed his intention of including all, and not to give to one excluding the others.‡

4. When the devise is to a class of persons, and any of that class may have to be ascertained at a period too remote, the devise fails, for the reason that the testator intended that the amount of each member's share

†1 Cox 324; 8 Hare 120; L. R. 5 App. Cas. 714; 11 Hare 372.

‡2 Hare 120; 2 H. Bl. 358.

should be ascertained by dividing the whole sum given, by the number of members in the class.*

5. When the gift is given to a class, but a definite and fixed sum is given to each member of that class, and cannot be increased or diminished by the increase or diminution of the members of the class, the gifts to each are separable, and those falling within the limit of the rule are good, the others bad. Thus if \$20,000 is given to each of five persons in a class, when they arrive at a certain age; here each gift is separate so that each member of the class stands on his own footing, so that the devise may be good as to some and bad as to others.†

6. If, when the devise takes effect, there is a member of the class who can take, the class is closed and the devise is not bad for remoteness, although the gift may not be divided within the time fixed by the rule.

Sec. 1485. RULES FOR DETERMINING WHETHER OR NOT THE CLASS IS CLOSED.—Whether or not the class is closed when

*This is an important rule. As where a gross sum is given to A's children who shall arrive at the age of 25, you cannot ascertain how many will arrive at the age of 25 within the time limited. The whole will fail because you do not know what each of them will get. 12 Cl. & Fin. 546; 2 Merrivale 363; 11 Hare 372.

†1 H. L. Cas. 406; 30 Beav. 111. In the last case there was a bequest of \$2,000 to each of the testator's daughters, to each of them who should arrive at the age of twenty-four. It was held good as to the daughters who had arrived at the designated age within the rule.

the devise takes effect, depends upon certain rules of construction, as follows:

1. When there is a general devise to children or other persons as a class, the class includes only such persons that are in being when the testator dies, that is, when the will takes effect.*

2. When the devise is to take effect after the termination of a prior estate, only persons in being answering the description at the expiration of the prior estate, are included.†

*1 Ves. Jr. 405; 1 Ves. 391; 2 Atk. 121; 125 Mass. 536; 4 Paige 47. In the case in 2 Atk. 121, the testator made a will giving lands to his widow for life, remainder to W. M., charged with \$400 to be paid within six months after the death of his wife for all the children of his sister Catharine, share and share alike. After the death of the testator another daughter was born to Catharine. The court held that such child did not take, only the children in being at the time of the testator's death were entitled to take. This rule does not exclude children born after the will is made and executed and before the testator's death, but does exclude the children born after his death.

†Where an estate is devised to A for life, remainder to his children, there is no trouble at all. But where the estate is given to A for life, remainder to B's children. A and B are both alive. At the time of the testator's death, B has two children; at the time of A's death, B has four children, and afterwards has two more children born to him. In such a case the class is closed when A dies, and the four children that are then in *esse* take the devise, and those born afterwards do not take. 1 Cox 327; 125 Mass. 536; 138 Ind. 506. In the case in 125 Mass. 536, the testator left his estate to two sons, providing that if the sons died without issue, the estate should go to the children of their two brothers and one sister, share and

3. When the gift is to a class generally, payable at a certain period, as to children when they arrive at a certain age, all children in being when the first child arrives at the designated age are let in; after born children are excluded.*

4. When the devise is given to each of several persons who shall succeed each other in some certain position, in office, for instance, none except those in being at the death of the testator can take.†

These rules of construction have been adopted by the courts to determine the intention of the parties who use certain words and phrases, by declaring in advance what meaning shall be given them.

share alike, remainder to their issue. Both sons died without issue and at their death there were 23 nephews and nieces. The court held that each of these took a vested interest upon the death of the uncles, and that children born after that did not take.

*3 Brown, Ch. 401; 3 Ves. 730; 64 Mo. 469; 4 Mass. 97. In the case in 3 Ves. 730, the bequest was to the children of A when they severally arrive at the age of sixteen. At the testator's death there were six children, and the oldest was past fifteen, but not sixteen. Three children were born to A after the oldest arrived at the age of sixteen. The court held that the six children that were in existence at the time the oldest one attained the age of sixteen would take, and that those born afterwards were excluded.

†8 Cl. & Fin. 611; 5 Mod. Rep. 232; 10 Simons 495.

CHAPTER VIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

Sec. 1486. THE FREEHOLD ESTATES OF DOWER AND CURTESY.—There are two freehold estates created for the benefit of the family. The rules of law applicable to these estates are only intelligible by remembering that the family was originally the unit of government, and the rules of law aimed to assist the head of this family in performing the duties which the system of government imposed upon him. These two freehold estates, known to the early common law, and still created by operation of law, are: 1. The estate of *dower*, and 2. The estate of *curtesy*.

Sec. 1487. DOWER DEFINED AND EXPLAINED.—Dower is the estate which the widow is entitled to and which is assigned to her out of any freehold of inheritance of which her husband was seized during coverture and which her issue might possibly inherit. It is essential that the estate should be a freehold of inheritance, and that the issue born of the wife might possibly inherit the same.

This estate of dower assigned to the widow, at the common law, is a life interest, in severalty, of one-third of the husband's lands, tenements and hereditaments, and did not include personal property, but did include

such fixtures that were immovably attached to the freehold.*

In some States the statutes have modified, and in others abolished dower. In some States the widow inherits one-third of her husband's estate. In some of the States it depends upon whether or not there are children, if there are no children, the wife inherits the husband's estate.

By the Ordinance of 1781, the common law right of dower was established in the North West Territory.†

Sec. 1488. **THERE ARE THREE ESSENTIALS TO THE ESTATE OF DOWER.**—There are three essentials to the estate of dower, these are: 1. Marriage. 2. Seizin of the husband. 3. Death of the husband.

1. The marriage must be a legal marriage as distinguished from a void marriage. Thus where one of the parties is insane at the time of the marriage, it is void, and the widow in such a case would have no right of dower. If the marriage is merely voidable, as for want of sufficient age, if the parties continue to live together until they have reached the legal age, the marriage becomes valid, and the widow would be entitled to dower.

2. If at any time during coverture the husband became seized solely in his own right, of any estate of inheritance, that is, a fee simple or fee tail, in lands

*2 Bl. Com. 131; Lit. ss. 36, 53; 4 Kent Com. 68.

†1 Mich. 1; 11 Ohio 219.

to which any issue, which the wife might have had, might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed in severalty during the remainder of her life.* Seizin in law is sufficient, and seizin in deed is not necessary. Otherwise in the case of an estate by curtesy.

3. The husband's death may be a natural death, or a so-called legal or civil death, as by becoming an outlaw, or entering a monastery at common law.

At common law the wife of an alien was not entitled to dower because an alien could not hold property. But in most if not all of the American States, an alien can hold property, and hence the widow of such a person would be entitled to dower.†

The wife has no interest in the lands during the lifetime of her husband, and in this matter dower differs from curtesy. At common law, the husband had actual control of his wife's property during coverture. So far as dower is concerned it is an interest, and becomes an estate upon the death of the husband. During the life of the husband it is an inchoate estate, and does not become a vested interest until his death. It being a mere possibility, her deed passes no title; and she could not release her right to a stranger, only to the owner of the fee.‡

*1 Williams, Real Prop. 233.

†1 Cowen 89; 5 Cowen 713; 11 Ohio 219.

‡55 N. Y. 4; 9 Paige 201.

Sec. 1489. NATURE AND INCIDENTS OF A DOWER INTEREST BEFORE IT HAS BECOME VESTED.—Until dower becomes vested, it is subject to the control of the legislature, and may be changed, modified or abolished without violating any constitutional provision.

But the interest which the wife has is so far a valuable interest as to be a good consideration for a deed, though it may be destroyed by the legislature without any remuneration whatever, since it is not regarded as property within the meaning of the constitutional provision. It is not regarded as a property right but a mere inchoate interest which may ripen into an estate if the wife outlives the husband. It is an interest which the law gives her to support her family after the death of the husband. It being a provision for her maintenance after her husband's death, the law would not permit him to sell his land and deprive her of her interest. But if she united in a deed conveying her husband's land she was estopped from claiming dower therein.*

Sec. 1490. HOW CAN A WIFE RELEASE HER DOWER WHILE HUSBAND STILL SEIZED?—In some States as Michigan, the wife may make an arrangement by which she deeds to him all her interest as to dower, so that the husband can pass a clear title by his individual deed. But this is unusual. A divorce usually bars the right of dower, but in Michigan, a wife divorced through the fault of her husband, is still entitled to dower.

*46 Me. 9; 17 Ind. 517; 81 N. C. 267; 37 Mich. 563.

Sec. 1491. TO WHAT DOES THE DOWER ATTACH?—The widow is dowable in mines if they are open and being worked, but she is not entitled to open new mines. The theory being, that she is dowable in the lands in the condition that they were at her husband's death.*

At common law the widow had dower in all of her husband's land, no distinction being made between cultivated and woodland. In America the question has been raised in most of the States whether she was dowable in woodland, and the decisions of the question have not been uniform. In Maine, New Hampshire and Massachusetts, dower in woodland is not allowed.† In most of the other States dower in woodland is allowed the widow.‡

In the case where wild lands have been sold by the husband, and have been subsequently improved by the grantee, the widow is entitled, under the Ohio rule, to dower in them as of their value at the time of the assignment of dower, less the value of the improvements.§ Under the New York rule, also the common law rule, the widow is entitled to dower in the lands of her husband which he had sold and which had been subsequently improved, as of their estimated value at the time of the sale, without any reference to the improvements or

*1 Taunt. 402; 1 Cowen 460; 10 Pick. 460.

†2 N. H. 56.

‡2 Douglas 141; 17 N. J. 32; 10 Wend. 480.

§Allen v. McCoy, 8 Ohio 418.

enhancement in the value of the lands.* In Pennsylvania, the wife is not entitled to any advantage by reason of improvements added to the land by the purchaser, but she is entitled to the improvements in the general surroundings of the land and country, by which the general value of all land is increased, and this rule is followed in other States.†

Sec. 1492. NATURE AND QUALITY OF THE ESTATE SUBJECT TO DOWER.—The estate of the husband to entitle the wife to dower must be a *freehold* estate that the issue of the wife might by possibility inherit.‡

The estate of the husband must confer a right to an immediate freehold, that is, there must not be any intervening freehold. Thus if an estate is given to A for life, with remainder to B, here if B dies, his widow is not entitled to dower if A's life estate is still outstanding. If A dies his widow is not entitled to dower because the life estate which he had is not a *freehold of inheritance*. But if A dies first, B's widow would be entitled to dower, because the life interest had dropped out before B's death.

So if the husband has the life estate and afterwards acquires the remainder, and then dies, dower attaches;

*Humphrey v. Pinney, 2 Johns. 484; Shaw v. White, 13 Johns. 179; Walker v. Schuyler, 10 Wend. 485; Tod v. Baylor, 4 Leigh (Va.) 509.

†Thompson v. Morrow, 5 Serg. & Rawle 289; Shirly v. Shirly, 5 Watts 328; Dunseth v. Bank of U. S., 6 Ohio 76; Manning v. Laboree, 33 Me. 343; Summers v. Babb, 13 Ill. 485.

‡Co. Litt. 40; 5 N. Y. 304; 1 Wash. 153.

as the two estates merge and he becomes possessed of a freehold of inheritance.*

Not only an intervening freehold will prevent dower from attaching, but if there is a possibility of a freehold estate intervening, it will not be subject to dower. Thus in the case of joint-tenants, the estate of each joint tenant goes, upon the death of one of them, to the survivor or survivors; so if there are two joint tenants and one of them dies, the widow of the deceased tenant has no dower, but the surviving joint tenant taking the whole property by right of survivorship, on his death, his widow would have dower in the whole estate.†

The husband must be seized either in deed or in law during coverture. This was the rule of the common law, and was enforced both by courts of law and equity. This doctrine was carried so far that if a man was seized in fact and disseized, and then married and died before he had acquired seizin again by the eviction of the disseizor, his widow was not entitled to dower. This rule of the common law has been modified by statute so that if a person is evicted by a wrong-doer, and while he is out of possession he marries and dies before again obtaining possession, the widow is still entitled to dower in the premises.

A wrongful seizin of the husband entitles his widow to dower as against all persons claiming under such tortious seizin.

*1 Washburn, Real Prop. 155; 50 N. Y. 161.

†1 Wash. Real Prop. 156; Parke on Dower 72.

When lands are purchased and a purchase price mortgage is given back to the grantor, the mortgage and the deed is considered as one transaction, and the husband is regarded as taking the land as encumbered by the purchase price mortgage, and the mortgagee's lien is not subject to the widow's dower. That is, the widow is only entitled to dower in the land after the mortgage is satisfied.

If the husband purchases land on borrowed money and gives a mortgage to the person furnishing the purchase price, this is regarded as two distinct transactions, and the title vests in the purchaser absolutely. So that the mortgagee's lien for the money advanced would be subject to the wife's right of dower in the whole estate.* These rules are not of much significance now as in such cases the wife is required to join in the mortgage deed to secure the purchase price, and release her dower as regards such mortgage.

In regard to dower in estates acquired by exchange, it was the rule at the common law, that the widow of either party had the right to elect as to which of the lands exchanged her dower should attach, but she could not have dower in both parcels. Each widow might elect to have dower in the same parcel, but they could not have dower in both.† This rule of the common law has not been adopted in all of the States. The rule being in some States that both parties may be regarded

*45 Me. 193; 119 Mass. 519; 13 W. Va. 666.

†1 Greenleaf, Real Prop. 163, Sec. 12.

as purchasers, and the widow of each would have dower in both parcels of land.†

To bring a case of exchange within the meaning of these statutes, and the rule of the common law, the mutual transfer must be equal. It must be a trade and not a purchase. That is, A must transfer one parcel of land to B in exchange for a parcel belonging to B. If a price is fixed on each parcel, and then the exchange is made, it is a purchase and not an exchange.‡

While it is a maxim of the law, that a derivative estate can last no longer than the original estate out of which it was carved, and from which it arose, yet, in the case of dower, this rule seems to be contravened. Thus if an estate is given to A and the heirs of his body, and A dies without issue, terminating the estate tail. Here the widow's dower attaches the moment the estate is transferred to A. Though this right to dower is part of the estate given to A, it may outlast his death and the termination of his estate, and last until the widow's death, because it is considered as an incident to such an estate. This is true of estates of such a character granted upon conditional limitation, but not of

†1 N. H. 65. In Michigan the statutes provide that the widow shall not be entitled to dower in both parcels, but shall make her election, the same as at common law, and then provides that if she does not make her election within one year from her husband's death, she shall be presumed to have elected to take dower in the parcel which her husband received in exchange for the land he deeded.

‡1 Barb. 633.

estates upon condition. An estate upon condition is an estate granted to be held until the condition happens when the grantor has the right to re-enter. Upon such re-entry the grantor takes the estate as of the day he granted it, and free from all dower incidents.*

Sec. 1498. HOW LANDS MAY BE DISCHARGED OF THE RIGHT OF DOWER.—

At the common law the method of barring dower in lands sold by the husband was by levying a fine, in which the wife was separately examined.† The plan also grew up of conveying the land to uses, as to convey land to the purchaser and his heirs to the use of the purchaser and a trustee and the heirs of the purchaser.‡ It was also permitted by the Statute of Uses (27 Hen. VIII, c. 10), to bar dower by a *jointure*, or settlement, agreed to and accepted by the intended wife, previous to marriage, which settlement was in lieu of dower. If such a jointure be made after marriage, the wife may elect between her dower and her jointure.§ In England, by the Act of 3 and 4 Will. IV, c. 105, becoming operative on the first of Jan., 1834, the statutes and rules relating to dower were changed, and the husband given control over it, to the extent that dower is barred in any lands which he shall absolutely dispose of in his lifetime by deed or by will, and the widow can

*3 Halstead 241.

†Williams, Real Prop. 233.

‡Williams, Real Prop. 234; 1 Metc. (Ky.) 670; 1 Ala. 362; 5 Paige 318; 19 Mo. 487.

§Williams, Real Prop. 235.

claim no dower as against the debts and contract obligations of her husband, so that the widow has no claim to dower except as against the heir at law.*

In America, the statute of Henry VIII, above referred to, has been substantially re-enacted in most of the States.† In Rhode Island, Virginia, Ohio, Kentucky, and Missouri, if the jointure or other estate conveyed in lieu of dower was made while the woman was an infant or after marriage, she may, after her husband's death, waive it and claim her dower. In Maine, Massachusetts, Indiana and Arkansas, that no jointure will bar the dower, unless made before the marriage and with the consent of the wife expressed in the deed, and such are substantially the provisions in Connecticut and Delaware, and, it is believed, in most of the States.‡ Where the will of the husband contains a provision for the wife's benefit, the doctrine of *election* arises; that is, the wife in some cases is required to elect whether she will claim her dower in opposition to the will, or accept its provisions in place of it. Thus in Delaware any devise, and in Pennsylvania any bequest or devise, will be taken to be in lieu of dower, unless the testator declares otherwise, the widow still having her election. In New York, New Jersey and Tennessee, any testamentary provision defeats the dower unless within a certain time the widow dissents, as also in Massachusetts, Ohio

*Williams, Real Prop. 236, 237.

†Kennedy v. Nedrow, 1 Dallas 417; Hastings v. Dickinson, 7 Mass. 155.

‡1 Greenleaf's Cruise 195, 200; Rev. Stat. Ohio, Sec. 4189.

and Alabama, unless it plainly appear by the will that the testator intended she should have both.* So divorce, may bar the offending party of dower in the other's land.†

The usual method of barring dower in lands which the husband desires to sell, is for the wife to join in the deed, and therein release and relinquish her right to dower. In some States it is necessary to examine the wife apart from her husband in taking the acknowledgment of such a deed, but in other States this is not necessary.

Sec. 1494. THE LAW WILL NOT GRANT DOWER OUT OF A DOWER ESTATE.—It is a rule of law that a person cannot have dower out of dower. Thus, if a father is possessed of three acres of land, and he has a son, and each are married. If the father dies leaving a widow, she becomes entitled to a life interest in one acre of the three, the other two acres descend to the son. If the son dies before the previous dower estate terminates, his widow will be dowerable only in the two acres which have descended to him. The son being seized only of two acres, the other acre being his in remainder on the termination of the previous life estate.‡

Sec. 1495. OF THE ESTATE BY CURTESY.—The estate by curtesy, or, at common law, the estate by the curtesy of England, is the life estate which the

*Williams, Real Prop. 6th Am. Ed. 236n.

†Rev. Stat. of Ohio 5699, 5700.

‡Co. Litt. 31a.

husband has in the real estate of the wife where the wife was seized of an estate of inheritance, and bore him issue, born alive, capable of inheriting such estate.

By the rules of the common law, the husband being the head of the family, had the right of possession and the emoluments arising from his wife's property during her life, this being an incident to the marriage relation at the common law.

In addition to this common law right, if there was issue born alive, capable of inheriting the wife's estate, the husband became entitled to a life estate in the property of the wife after her death. This right commenced at the birth of issue capable of inheriting and became complete or consummate upon the death of the wife. In case no issue were born alive capable of inheriting, upon the death of the wife her real property went to her heirs at law, the husband having no further claims upon it.† But if children were born alive, though they did not continue to live, the husband had the right to retain possession of the entire property and the profits arising therefrom during his life, and is called a tenant by curtesy.

Sec. 1496. CURTESY IN THE UNITED STATES.—Unless abolished by statutes for the express purpose, or by implication from statutes known as "Married Women Acts," giving to married women the same control over their property as they had before marriage, curtesy exists in the States as at com-

†2 Bl. Com. 126; Litt. ss. 35, 52; Williams, Real Prop. 227, 228.

mon law. Some of the States hold that the acts enlarging the rights of married women over their property are inconsistent with the estate of curtesy, and therefore abolish such estate by inference.* In other States curtesy has been abolished by express statutes. In Ohio, the right of curtesy is abolished and the husband is given the right of dower in his wife's real property to the same extent as she has dower in his.†

Sec. 1497. **THE ESTATE BY CURTESY MAY BE SAID TO EXIST IN TWO STAGES, INITIATIVE AND CONSUMMATED.**—The estate of curtesy exists in two stages: 1. In the *initia-*
tive, upon the birth of issue capable of inheriting. 2. *Consummated*, upon the death of the wife.

Some of the courts have intimated that the estate by curtesy begins at marriage; this is a mistake, there is no estate at all until the birth of issue, and after issue born there exists an estate separate and distinct from the right of possession of the wife's estate given by virtue of the marriage relation. The estate of curtesy ends only with the husband's death, and may be seized on execution to satisfy claims against him. If sold upon execution before the death of the wife, then, it continues until the death of the husband, but if the husband dies before the wife, the estate ceases upon his death. The purchaser of such an estate acquires no greater interest than the husband had.‡

*5 Cowen 74.

†Rev. Stat. Ohio 4194-1.

‡100 Ill. 347; 5 Cowen 74.

Sec. 1498. TO CREATE AN ESTATE BY CURTESY THE FOLLOWING THINGS MUST EXIST:—1. There must be a legal marriage. But if the marriage is a voidable one, and never voided, it will sustain the estate by curtesy. While if the marriage is void no estate by curtesy arises.†

2. Issue capable of inheriting the estate must be born alive. Not only must there be an estate of inheritance, but an estate capable of being inherited by the wife's children must exist. So that if an estate is given to a woman, and to the issue of the husband she now has, and he has issue, the husband is then entitled to curtesy. But if the husband indicated dies, and the woman marries again and has children to her second husband, and then dies, the second husband is not entitled to curtesy in the lands since the issue born are not capable of inheriting the estate. There must be a freehold in the wife which her issue are capable of inheriting.*

†Co. Litt. 38.

*2 Bl. Com. 127. It was formerly the rule that the issue must be born during the life of the mother, and if the mother died before the child was born, or delivered, then there was no estate by the curtesy. The reason for the rule was that there was no issue during the marriage relation, since the relation was dissolved by the death of the wife. But this rule has given away to the one which holds a child in existence, though unborn, to have the same rights as though born, and to so consider it where it was for the benefit of the child. So that though the child be born after the death of the mother, if it is born alive, curtesy arises. Co. Litt. 29b; Tudor, Leading Cases 65; 2 Paige 35. In Pennsylvania, since 1833, by Statute, the husband is given curtesy though there be no issue of the marriage.

If the child is born alive it does not matter how long or how short a time it lives. It is simply necessary to the vesting of the estate in the husband that the child be born alive.

It has been held that if a child is born out of wedlock and the parties afterwards intermarry, and if under the laws of the place of marriage the offspring are made lawful, then the right of curtesy exists, and vests in the husband.†

Sec. 1499. TO WHAT ESTATES CURTESY WILL ATTACH.—The estate by curtesy embraces all estates of inheritance held by the wife which her issue are capable of inheriting. That is, the estate attaches not only to absolute estates, but to qualified and determinable estates. The law being the same as to estates by curtesy as to dower estates.* The same distinction is made between estates upon condition and estates upon conditional limitation that is made in the case of dower. The estate by curtesy attaches to the estate upon conditional limitation, but does not attach to an estate upon condition.

The estate of curtesy attaches to equitable estates of inheritances, though the husband is not entitled to curtesy in a mere equitable right.†

Seizin is one of the essential requirements of an estate by curtesy. At common law the seizin of the estate must have been by deed, seizin in law not being con-

†9 Ala. 965.

*13 Ala. 723.

†Williams, Real Prop. 298.

sidered sufficient to support the estate. The reason for the rule was that it was the duty of the husband to take actual possession of the property of the wife, as she was unable to do it herself, and this duty being obligatory on the husband, if he failed to perform it, he could not have curtesy. This rule is modified by state statutes.† But the seizin of the wife, whether seizin in law or by deed, must be the seizin of a present estate. There can be no curtesy in a remainder or a reversion.§

Sec. 1500. THE ESTATE OF CURTESY CANNOT BE BARRED BY WILL OF THE PERSON GIVING THE LANDS TO THE WIFE.—The right of the husband to curtesy in his wife's lands cannot be barred by the will of the grantor or testator by which the wife become possessed of the estate, since curtesy is an inseparable incident of the freehold estate which attaches by a rule of law and cannot be contravened by the wish of a private person.*

Sec. 1501. AN ESTATE BY CURTESY MAY BE BARRED BY AN INTENTION SO EXPRESSED WHEN LANDS ARE CONVEYED IN TRUST TO USES.—A trust may be so created as to exclude the husband's right of curtesy. It is important to observe what provisions in a trust instrument will be held to show an intent to bar curtesy. If the estate is given directly to the wife without the intervention of a trust, it is not a question of intent, but

†13 Ala. 793; 8 Humphrey 298.

§40 Miss. 161; 8 Allen 425.

*37 Pa. St. 391; 100 Ill. 347.

one of power, as the courts hold that when a fee is created the grantor has not the power to make such a limitation. But if the estate instead of being given directly is conveyed in trust to a third person for certain uses, the grantor has the power to bar the dower or curtesy if he uses language which shows an intent to do so. So that in such cases the question for the court is to determine the intent of the grantor from the language used, and if it was the intent to bar dower or curtesy it will be barred. §

In some of the States it is held that the estate of curtesy is not barred, unless the language used in the settlement itself bars the estate by curtesy. That is, that no general language will be construed to deprive the husband of the estate which the law gives him.*

Sec. 1502. INCIDENTS OF AN ESTATE BY CURTESY.—The estate by curtesy is a life estate, and it may be leased or assigned by the tenant in curtesy for the full term and without his wife joining in the conveyance. The purchaser of such an estate acquires all the rights which the husband would have, in case he had not sold it.† The estate of curtesy is also liable for the husband's debts. But the estate on coming to the husband is subject to debts of the wife.‡

A divorce obtained by the wife against the husband bars the estate of curtesy, so that a purchaser of the

§30 N. J. 686; 7 Johns. Ch. 229; 30 Ga. 308.

*6 Mo. App. 549.

†31 Ill. 219; 22 N. H. 491.

‡54 Miss. 50; 9 Vt. 26; 8 O. Pa. St. 391.

estate from the husband would have no claims in it though he purchased before the divorce was granted.

The most usual method of barring the estate by curtesy is for the husband to join his wife in a deed, in the same manner that a wife may bar her right of dower by joining in a deed with her husband. §

§76 Pa. St. 280. In a number of States including New York and Michigan, it is held that the Married Woman's Acts abolished by implication the estate by curtesy, so that in such States there is no estate by curtesy.

CHAPTER IX.

OF JOINT TENANTS AND TENANTS IN COMMON.

Sec. 1508. MEANING OF AN ESTATE IN JOINT TENANCY.—By joint tenancy is meant that two or more persons hold the title and profits of land, as respects all other persons, as though they constituted one single person. As between themselves they have distinct rights, but such rights are equal in every respect, each having the same rights as regards the estate as another. A joint tenancy is therefore said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of commencement of such title.*

Any estate may be held in joint tenancy, and wherever lands are given simply to A and B, without further words, they become at once joint tenants for life. They are regarded as one individual, as respects other persons, and the life estate would continue so long as either of them was alive. As between themselves, each would be entitled to share equally in the rents and profits while both lived, but on the death of either one the interest of the deceased joint tenant, instead of going to his heirs or representatives, passes to the survivor, who becomes entitled to the whole estate by right of survivorship during the residue of his life.*

*2 Bl. Com. 180; Williams, Real Prop. 132. Joint tenancy was so favored at the common law, as the feudal system aimed

An estate in fee simple may also be given to two or more persons to hold as joint tenants. In such cases the land is granted them and *their heirs*, but because of the rules of survivorship, the estate will descend to the heirs of the survivor instead of to the heirs of all of them, if the joint tenancy continues so long. Thus, if an estate is given to A, B, and C, and their heirs, the three persons are seized of the entire estate. This estate as a whole will pass to the survivor or survivors on the death of either of the joint tenants, and on the death of the survivor of the three, will pass to the heirs of such survivor, to the entire exclusion of the heirs of those who previously died.*

A joint tenancy in fee simple is more common than joint tenancies for life or in tail. The estate is chiefly created where it is desired to have the estate vest in trustees, who are ordinarily made joint tenants, the whole estate vesting in the survivor for the uses and purposes of the trust.

The joint tenants are not regarded as having any separate interests, except as between themselves, and consequently have no estate which they can devise by will, while two or more of them are living. On the death of the survivor, the estate will descend to the heir at law, or to the devisees of such survivor.

to keep the title in one person, that if it was desired to create an estate by tenancy in common, it was necessary to indicate in the deed, that the estate was to be held as tenants in common and not as joint tenants.

*Co. Litt. 184a; Litt. s. 280; Williams, Real Prop. 134.

Sec. 1504. INCIDENTS OF AN ESTATE IN JOINT TENANCY.—The joint tenants being regarded as but one owner, their estate or interest must be created at the same time; that is, A and B as joint tenants, must receive the estate by the same grant, and not come into their interest at different times.* Each tenant is regarded in law as having the whole of the estate, so that if it was desired to transfer the interest of one joint tenant to another it could not be done by livery of seizin, as he already had delivery, the proper form was to make a release by deed, which operated as an extinguishment of the rights of the grantor.†

Sec. 1505. SEVERANCE OF AN ESTATE BY JOINT TENANCY.—The incidents of survivorship as to estates by joint tenancy might be put an end to or *severed* during the lifetime of the joint tenants, as each joint tenant might dispose, in his lifetime, of his share of the lands held in fee simple, by any of the usual modes of conveyance except by will. But if the tenant died without making such a sale the land went to the survivor or survivors free from his share or moiety. By a sale in the lifetime of a tenant, the share held by him was regarded as severed or cut off from the estate, and discharged from the incidents of joint tenancy, and

*2 Bl. Com. 181. An exception to this rule existed in favor of a conveyance by virtue of the statute of uses, and perhaps in the case of estates created by will. Williams, Real Prop. 135.

†Co. Litt. 169a.

passes to the grantee to be held as a tenancy in common.*

As early as the time of Henry VIII, by statute it was permissible for one tenant to compel his companions in joint tenancy and tenancy in common to submit to a *partition* of the estate between themselves according to the value of their shares, so that each might hold his portion in *severalty*. This method has been simplified and is enforced in the equity courts, the tenants may also make mutual deeds or releases, and thus apportion the joint estate between themselves in severalty.

Sec. 1506. EFFECT OF MODERN STATUTES ON AN ESTATE BY JOINT TENANCY.—Statutes in the various States and Canada, have been passed abolishing the main feature of joint tenancies, the right of survivorship, or the *jus accrescendi*, except in some cases, as regards estates so granted to trustees, husband and wife, partners, and the like.† In Virginia and Pennsylvania the statute abolishing survivorship in joint tenancy makes an express reservation as to trust estates, since in these estates it is desired that the interest of the deceased trustee shall pass to the survivor or survivors to answer the purposes of the trust. In many of the States provision is also made

*Thus, if three persons held an estate as joint tenants, and one of them sold his interest, the purchaser would become seized of a one-third part (undivided) of the estate as a tenant in common, and the remaining tenants would remain as joint tenants. Co. Litt. 189a; Williams, Real Prop. 136.

†Greenleaf's Cruise on Real Prop. 364.

by statute, that where a power is given to several trustees, and one or more die, or are discharged, the title and authority of such trustees shall pass to and vest in the survivor or survivors.

Sec. 1507. WHAT IS MEANT BY TENANTS IN COMMON.—"Tenants in common are such as have a unity of possession but a distinct and several title to their shares. The shares in which tenants in common hold are by no means necessarily equal. Thus one tenant in common may be entitled to one-third or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seized in fee of his and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and a tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate."* And, as we have seen in the last section, may compel partition of the undivided land, and thus come into full control of his interest in severalty.

*Williams, Real Prop. 137.

CHAPTER X.

WHAT PASSES WITH A GRANT OF LAND.

Sec. 1508. THE TERM "LAND" INCLUDES EVERYTHING PERMANENTLY ATTACHED TO IT.—Land, in its legal signification, includes not only the soil or ground, but also everything that is permanently attached to it, such as buildings, trees, fences, and the like.*

So the owner of a given parcel of land is regarded as owning from the center of the earth to the zenith, unless his ownership has been restricted by the express or implied conditions in the grant. For there may be several distinct interests, each owned by a separate person. There may be as many estates as there are separate and distinct interests, which can be separated and specifically described, and each owner may have a fee simple in the particular interest which he has in the property. Thus, one person may be the owner of the surface, and another the owner of the minerals below the surface. That is, the ground may be divided into estates parallel to each other, one above the other.†

*9 Conn. 374; s. c. 23 Am. Dec. 361; Coke, Inst. 408.

†143 Pa. St. 293; 152 Pa. St. 286. In the last case the question was as to the right of the surface owner to sink a shaft through a strata of coal which he had sold in order to reach gas and oil which were situated below the coal. The court held that when a person purchases the coal upon lands,

Where the deed makes no reservations, but simply conveys the land, everything passes, from the center of the earth to the zenith. All minerals are included in such a grant, so that if it is desired to reserve minerals below the ground, a special exception must be made in the deed.

But while the owner of the surface has rights over the space or air above the surface, and is entitled to use it by erecting buildings thereon, and if another person desires to use it, as by stretching wires across it, he must first obtain the permission of the owner of the surface, or be answerable in damages, yet the ownership is not the same as that of the surface of the ground. If any one uses the air or space above the surface for twenty-one years, or the statutory period for obtaining prescriptive rights, adversely to the owner, he obtains

he simply purchases for the time being the space which the coal occupies; that he is not the owner in fee of that space except so long as is necessary to use it for the removing of the coal which he has purchased. What he has bought is the coal and not any part of the surface. When the coal is all out the purchaser has no longer a right to use the space for the transportation of coal from other land, since it belongs to the owner of the surface.

There may be separate and distinct freehold interests in the different apartments of floors of a building. When a room or floor in a building is conveyed, no interest in the soil is conveyed, except to have the room supported by the soil. And if there is no agreement or covenant to rebuild by the grantor, and the room or building is destroyed by the elements, the owner of the room loses his freehold estate.—110 Ind. 325; s. c. 59 Am. Rep. 209; L. R. 9 Eq. Cas. 671.

an indefeasible title to such use the same as he would over the surface.*

Sec. 1509. INCIDENTS THAT PASS WITH A GRANT OF MINERALS.—When the owner of lands conveys to another some particular mineral or minerals, there passes as appurtenant to the grant, the right for the purchaser or his representatives to go upon the surface and sink a shaft for the purpose of finding the minerals and removing same; and the owner of the surface and rest of the estate has the reserved right to sink a shaft through the strata or mineral granted for the purpose of reaching other minerals, as oil and gas not granted, and which lie below the one granted.†

Petroleum oil in place is a mineral, and may be conveyed separately from the soil the same as any other mineral. It is real property while in the earth. All minerals are real property while in the earth, and become personal property as soon as they are detached.‡

Natural gas, so long as it remains in the soil, is considered as a mineral, but owing to its peculiar properties, it is liable to escape and pass to the land of another, in which case the original owner loses his estate therein.§

So it has been held that where one person has the right to bore for petroleum and in doing so natural gas escapes through the opening thus made, he has the

*7 Cush. 351; 55 N. Y. 538; 51 Cal. 258.

†18 L. R. A. 702; 152 Pa. St. 286.

‡86 Pa. St. 194; 39 W. Va. 231; 130 Pa. St. 35.

§131 Ind. 277; 131 Ind. 408.

right to use without being liable to account for it.* But it is possible that this holding would be revised to the extent to allow the owner of the surface to recover the reasonable value of the mineral thus inadvertently secured and used.

Sec. 1510. STANDING FOREST TREES ARE A PART OF THE REALTY.—Forest trees while standing are a part of the realty, and are regarded as realty to the extent that a grant of them must be made in writing to satisfy the requirements of the Statute of Frauds. But while it is generally held that a parol or oral sale of standing trees passes no title, yet it is good as a license for the removal of the trees that are cut previous to a revocation of the grant or lease.†

And where lands are sold by deed and there is a parol reservation of standing trees, this reservation is within the Statute of Frauds, and invalid.‡ But if the reservation was made in the deed, the title to the trees does not pass.

Sec. 1511. NURSERY TREES AND SHRUBBERY ARE A PART OF THE REALTY.—Nursery trees and shrubbery, although planted with the intention of removal, are regarded as part of the realty, and unless reserved, will be covered by a mortgage on the realty, and will pass to the vendee upon the sale of the realty.§

*28 W. Va. 210; 28 Am. Rep. 659.

†145 Mass. 410; 87 Mich. 107.

‡71 Ind. 493; 21 O. S. 596.

§47 Ia. 479; s. c. 39 Am. Rep. 487; 31 Conn. 594; 4 Kan. 300.

Fallen trees and timber that has been cut down pass to the vendee of land by deed if there is no exception or reservation made in the deed.* But if in addition to being cut down the trees had been cut into logs, timbers, or fire wood ready for market, they then become personal property, and a sale of the land does not convey to the purchaser any title to such property, and the former owner of the land may go upon the land and remove such wood or timber. The proper form in such case, and where it is desired to retain some portion of the estate, is to use the word "excepted," as, "except the standing trees," "except the minerals," and the like, which exception keeps the property thus excepted out of the grant, or simply conveys the rest of the property.†

If the grantor desires to take something out of the granted premises, to create a new estate, the proper term to use is, "reserved." Thus, where A sells a parcel of land and desires to have a right of way over it which did not exist before, the proper term for him to use is, "reserved." The use of this word in describing the estate desired to be created anew from the grant, creates an interest appurtenant to the dominant estate; it may be an easement proper, or a profit *a prendre*, or an easement in gross, or a profit *a prendre* in gross. The reservation creates a new estate, and since it does so you should use the same terms in creating it that

*54 Me. 309; 16 Ill. 480.

†1 Pick. 28.

you would in creating a fee; that is, it should be *reserved* to the grantor, his *heirs* and assigns.*

When standing trees are excepted from a grant, and it is further provided that such timber shall be cut and removed within a specified time, this stipulation must be observed or the right will be lost.† If no time is specified in which the trees are to be cut and removed, they are to be cut and removed within a reasonable time, and if they are not so cut and taken away within a reasonable time after the owner of the land notifies the exceptor to do so, the trees will be forfeited to the owner of the land. The rule as to reasonable time is implied where the parties have set no time, and is usually a reasonable time after notice given by the owner of the land.‡

Sec. 1512. RULE WHEN TREE EXTENDS OVER THE PROPERTY LINE.—When the trunk of a tree stands wholly upon the land of one person, and the branches project over the land of another and the roots of the tree extend into the soil of the other,

*3 Wash. Real Prop. 440. As a matter of fact these terms are used indiscriminately in grants, and the courts therefore examine the language of a deed to ascertain the real meaning intended by the language used.

Profits *a prendre* differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience in land without profit. Thus rights of pasture, digging sand, and the like are easements, while right to light would be a profit *a prendre*.

†90 Pa. St. 422.

‡60 Mich. 620.

it has been held that the fruit upon these branches which project over the land of the second party belong to the owner of the land that the trunk of the tree stands on, but the other property owner may cut the branches and remove them if they constitute a nuisance.*

Where the tree stands so that the property line passes through its trunk it belongs to the adjoining owners in common. Some courts hold that the parties are absolute owners of that part of the tree which stands upon their respective lands.†

The fact that a boundary line tree, or one near a boundary line, is allowed to extend its branches over

*38 Va. 115; 22 Eng. C. L. 485. In the first case an apple tree had been planted six feet from the boundary line and the roots and limbs of the tree extended beyond the boundary line, and the branches overhung the adjoining land. The owner of the land adjoining undertook to gather the fruit, on the ground that he owned the space where the branches stood and also that the roots gathered nourishment from his soil, but the court held that the fruit belonged to the owner on whose land the trunk of the tree stood. But the adjoining owner could trim off the overhanging branches while standing upon his own land, and not be a trespasser.

†83 Iowa 301; 25 N. Y. 123; 38 Vt. 118. In the first case a suit for damages was brought for cutting trees growing upon the boundary line. The court held that the trees were owned in common, and since they were so owned, if either party destroyed them, he was liable to the other party in damages for any injury he might sustain by the destruction of the trees. In the New York case an injunction was granted restraining one party from cutting a tree so situated. The general rule being that such trees are owned in common by the adjoining owners.

the adjoining land, is not such an adverse user of such land as will give the other owner an easement by prescription. The adjacent owner is regarded as simply tolerating a nuisance, and the mere existence of a nuisance for any length of time will not be allowed to create a prescriptive right.*

Since the entire tree belongs to the owner on whose land the trunk of the tree stands, the fruit of the tree belongs to him also. The owner of the trunk may gather the fruit of the whole tree from the branches if he can do so while standing upon his own premises; he is a trespasser if he goes upon his neighbor's land to gather the fruit. The fruit after it has dropped from the tree onto the ground still belongs to the owner of the tree, and he may go upon his neighbor's land and pick up such fruit, or take other steps to recover it.†

Sec. 1513. MANURE IS HELD TO BE REAL PROPERTY AT COMMON LAW.—A number of rules fixing the nature of property grew up at the common law, and which have come down to modern times,

*1 App. Cases 1; L. R. 3 Ch. 1; 11 Conn. 177. The adjoining owner cannot lop off the projecting limbs unless they are a nuisance, but they are considered as a nuisance if they do the least damage to the adjoining premises.

†9 Barb. 652; 2 Shower 28; 48 N. Y. 201. If the projecting branches are cut off they belong to the owner of the trunk, and he may recover them.

These rules are somewhat arbitrary, and are seldom necessary to be applied, as the common sense and courtesy existing between adjoining property owners is usually sufficient to make a neighborly division of the fruits of such trees possible and satisfactory to both.

one of these is, that manure is real property and belongs to the land. Therefore a tenant on land has no right to sell the manure as personal property, and if he does so it is regarded as committing waste. This rule was the result of an attempt to further good husbandry, and is prolific of many disputes in modern times. In some States the same rule exists as to straw; all straw stacks passing with the realty, as it is regarded as of no value except to convert into manure to enrich the soil; where it has a commercial value the rule might be different. The rule does not extend to hay, as it has a commercial value.*

Sec. 1514. ALLUVION DEPOSITS BELONG TO THE OWNER OF THE LAND ADJOINING.—Another of the rules of the common law is that all accretions or *alluvion* deposited along the shore of a running stream by gradual and imperceptible increase, belong to the owner of the adjoining land, where it is deposited, called the riparian owner.†

Sec. 1515. AEROLITES BELONG TO THE OWNER OF THE LAND.—It has been held that aerolites or meteoric stones falling from the sky are

*56 Me. 127; 41 Ill. 466; 21 Pick. 367; 48 N. H. 87.

†“Alluvion, within the rule that soil formed by alluvion belongs to the adjoining land owner, is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. The test as to what is gradual and imperceptible within the rule, is, though the witnesses may see from time to time that progress has been made, they could not

added to the land on which they fall, and the title to them is in the owner of the land.*

perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference as to the ownership." 23 Wall. 46; 18 La. 122.

*86 La. 71.

CHAPTER XI.

OF THE ANNUAL PRODUCTS OF THE LAND.

Sec. 1516. TWO CLASSES OF PRODUCTS OF THE SOIL—FRUCTUS NATURALES AND FRUCTUS INDUSTRIALES.—The products of the soil are divided into two classes, and the rules governing each are somewhat different. This division was made at a time when the cultivation of the soil had not attained the system and perfection which it has today, or the courts would not have made such a radical distinction.

The first class consists of those products produced naturally each year without the intervention of man, although labor or care may be necessary to bring such products to perfection; they consist of nuts, fruits, berries and grasses, and the like, and are called *fructus naturales*.

The second class consists of those crops or products which require an annual planting, as grains and vegetables, and the like, which are called *fructus industriales*, or emblements.*

*49 Minn. 412. In this case it was held that hops, though seemingly belonging to the first class as they grow up naturally each year, still are classed with the second since they require poles to be set for the vines and some little attention to bring to perfection. This was also the holding at the early common law, and the courts follow it.

The first class, *fructus naturales*, are regarded as real property so long as they are attached to the soil, since they are products of nature arising from the soil without assistance from man; the second class, *fructus industriales*, are considered personal property. The first class of products become personal property when they are detached from the soil.

This distinction is important upon a levy of an execution, or in making a sale of such products. A constable cannot levy upon apples that are growing on the trees since they are a part of the realty, since such officers are limited to levying upon the personal property only, while he may levy upon the crops of wheat, oats, vegetables and the like. So when the products of land are sold, the first class must be purchased with the formalities required to purchase realty, while the second class are purchasable as personalty.*

Sec. 1517. RULE AS TO NATURAL FRUITS OF THE SOIL.—It is the general rule that natural fruits of the soil are an interest in land, and the sale or mortgage of such products must be in writing to satisfy the Statute of Frauds. So that if it is desired to sell a crop of apples growing upon the trees it is necessary to go through the same formalities as to sell the trees themselves.† But in England, and in some of the States, whether such products are to be deemed an interest in land or not depends upon whether or not the parties intend that they shall be immediately severed

*4 Am. St. Rep. 807; 59 N. H. 201.

†1 Houston 9; 140 N. Y. 390; 55 Vt. 285.

from the land. If they are not to be severed immediately, then they are considered to constitute an interest land; if there is to be an immediate severance, they are considered as already severed, and as personal property.*

Sec. 1518. ANNUAL CROPS, OR EMBLEMENTS ARE GENERALLY REGARDED AS PERSONALTY.—In this country the general rule is that emblements or annual crops are personal property, and are not an interest in land. So that they can be levied upon as personal property; but upon the death of the owner of the land they go to the heir though they are personal property, and would be covered by a real estate mortgage.†

Growing crops produced from annual planting are also a part of the land as between the vendor and vendee of the land, unless there has been an exception in the deed. So, when a person sells his farm outright, and there are growing crops upon it, and no exception of the crops is made in the deed, the purchaser takes the land and everything growing upon it.‡

Growing crops go to the devisee of land in a will and not to the executor. The crops in such a case are regarded as connected with and a part of the soil. But the will may provide that the crops shall be regarded as personal property, in which case they would go to the executor and not to the devisee of the land. But

*L. R. 1 C. P. Div. 35; 46 Md. 212.

†49 Minn. 412.

‡19 Ill. 621; 23 Ind. 56; 75 Am. Dec. 592.

if the real estate becomes necessary to pay debts the administrator may sell it for that purpose, though at the early common law, the land could not be taken to pay debts, but went to the heir free from debts.*

Annual crops, *fructus industriales*, are regarded as personal property to the extent that they may be levied upon as such, and sold by parol.†

When annual crops are ready for harvest they are regarded in some of the authorities as severed from the soil;‡ while others regard them as still a part of the soil as between vendor and vendee of the land.§

When such crops are sold on execution against the owner, or have been sold by the owner to another person, such sale is regarded as a severance of the crops, so that they would no longer pass with the land.||

But a real property mortgage covers not only the land but all crops growing upon the land. Under the Massachusetts rule, the mortgagor may remove the crops before default; and under the New York rule he may remove them prior to foreclosure of the mortgage. When the mortgage is actually foreclosed, the crops growing at the time of the sale and foreclosure proceedings, belong to the purchaser, without reference to whether they were planted before or after default.||

*8 East 339; 27 Mo. 424; 63 Me. 350.

†10 Ind. 444; 96 Ala. 536; 42 N. Y. 146; 5 B. & C. 829; 81 Ill. 356; 27 W. Va. 576.

‡22 Mich. 254; 29 Ind. 509; 13 Me. 377.

§58 Ia. 133; 41 Ill. 466; 52 Kan. 709.

||38 Kan. 534; 22 Fed. Rep. 436; 90 Pa. St. 217.

¶43 Mich. 192; 79 N. Y. 568; 46 Wis. 301; 70 Cal. 296.

Crops planted by a lessee of the land belong to the purchaser under a foreclosure sale. The lessee is regarded as taking subject to the mortgage, and if he plants crops he must remove them before title passes under the mortgage to the mortgagee.*

It does not matter whether the foreclosure is at law or in equity, the same rule prevails in each case. The crops, as well as all fixtures upon the land go to the purchaser under a foreclosure sale. Then where the mortgage is in possession with a right to redeem within a period fixed by statute, he can remove the growing crops until his right to redeem expires.†

While the mortgage is a mere lien, all crops severed by the mortgagor before actual foreclosure belong to him, and he may make such severance by sale of the crops.‡ But this rule may change if the crops are not ready to harvest.§

*8 Wend. 584; 83 Ia. 705.

†2 N. Dak. 225; 5 Minn. 315.

‡115 N. C. 70; 52 Kan. 709; 115 Cal. 7.

§35 Kan. 122; 122 Mich. 666.

CHAPTER XII.

OF RIGHTS AND INTERESTS APPURTENANT TO LAND.

Sec. 1519. APPENDANT AND APPURTENANT DISTINGUISHED.—At the early common law the distinction between rights that were *appendant* to land and rights that were *appurtenant* to it were clearly distinguished. The word *appendant* signified something that went with the land as necessary for its enjoyment. Thus, under the feudal system, when lands were given to the villeins by the lord of the manor, there were certain interests and rights which went with the land as necessary to its beneficial enjoyment, as rights of pasture, of estover, of fishery, of common, and the like, they were always *appendant* to the estate unless they were acquired afterwards by the tenant. The tenant might also acquire other special privileges afterwards, so that the parcel of ground would not only have the *appendant* privileges necessary to its enjoyment, but might have other privileges acquired after the original grant, and called *appurtenant* since they were acquired afterwards, and were not essential to the enjoyment of the estate.* But this distinction is of little significance in this country at the present time.

Sec. 1520. THE NATURE OF THINGS THAT MAY BE APPENDANT OR APPURTENANT TO LAND.—It is said that nothing can be properly

*Co. Litt. 121b, 122a.

appendant or appurtenant to anything unless the principal or superior thing is of perpetual existence or continuance. Again, the appurtenance and thing to which it is appurtenant must be of the same nature. So that if a person has a right or privilege which he is to exercise separate from the land, it is not appendant or appurtenant to the land.*

And no right can pass with land as appurtenant to it unless it is a legal right. So the appurtenance must be something which adds value to thing to which it is appurtenant, as well as be of the same nature.†

Sec. 1521. OF THE MEANING THAT WILL BE GIVEN THE WORD "APPURTENANT."

—Strictly speaking the word *appurtenant* is not an apt word to describe a right not previously existing, as it has come to mean and describe rights which have always existed, or have belonged to the land, and not a newly created interest. It has been construed by the courts to mean, where necessary to carry out the true intention of the parties, "as usually occupied," or "as then occupied or used." So that if a person owns two parcels of ground, and is using one parcel in connection with the other, as if draining across it, or other use; and he sells one parcel and the purchaser desires to use it

*3 Southwell 40; 3 N. H. 190; Cro. Jac. 121.

†140 U. S. 304; 118 Mo. 61. Thus a lime-kiln on adjoining premises will not pass as appurtenant to a mill for grinding grain, though used in connection with such mill. And stock in an elevator or grain storehouse will not pass as appurtenant to a mortgage deed of railroad property.

just as the seller has used it, the grant should specify that it is to be used and occupied as it has been used and occupied previously, which would give the purchaser the right to so use it. But the same effect will be given to the sale, if the deed conveys one parcel and its *appurtenances*, provided the surrounding circumstances show that the use of the word "appurtenant" was with the intention that the purchaser should acquire the privileges of the former owner in the other parcel of land.*

The use of the word appurtenances in a grant of land will not be construed to convey anything but legal rights, so that if the grantor had been using adjoining land unlawfully, his deed would not give the grantee a right to continue such use; and a warranty of title would not extend to such unlawful use.†

So land cannot pass as appurtenant to land, but must be included in the description in the deed.‡

But sometimes in the construction of a will it will be necessary to allow a parcel of land to pass under the will not perhaps as appurtenant to land, but because the construction of the will demands it.§

An easement must belong to the estate, unless specially described in the conveyance, in order to pass under the grant as appurtenant.¶

*20 Q. B. Div. 225; 94 Mo. 56; 94 Neb. 56; 6 Neb. 1; 76 Me. 68; 96 N. Y. 604.

†4 Vt. 451; 29 O. S. 642.

‡8 Allen 285; 32 Vt. 384; 55 Vt. 475.

§1 P. Wms. 600.

¶97 Mass. 123; 11 Allen 388.

CHAPTER XIII.

SOURCES OF TITLE TO LAND IN THE UNITED STATES.

Sec. 1522. LAND OWNED BY GREAT BRITAIN PASSED TO THE UNITED STATES ON THE ACKNOWLEDGMENT OF INDEPENDENCE.—At the time the independence of the United States was acknowledged by Great Britain, she possessed all that portion of the present territory lying north of the Gulf of Mexico, and east of the Mississippi river, except a portion of Louisiana and Florida. By the express terms of the treaty acknowledging the independence of the United States, it succeeded to all the right of the British crown within these boundaries.

Sec. 1523. SUBSEQUENT PURCHASES AND ACQUISITIONS BY THE UNITED STATES.—In 1803, the United States purchased from France her holdings in North America, called Louisiana, including the present territory of Louisiana, Arkansas, Missouri, Kansas, Minnesota, Nebraska, North and South Dakota, Iowa, Montana, Idaho, Colorado, and Oklahoma and Indian Territories, this purchase consisting of about half as many square miles as the original territory of the United States.

In 1819, the government acquired from Spain the territory of Florida.

In 1845 the Republic of Texas was annexed. This

included all the territory comprised within the boundaries of New Mexico and Texas.

In 1848, the government acquired from Mexico all that territory west of the Rocky Mountains and south of the north boundary line of California, extending from the Pacific Ocean to the Rocky Mountains.

In 1867, the government purchased from Russia the territory of Alaska.

The territory included within the States of Washington and Oregon was acquired by the United States by right of discovery and settlement.

In 1896, the United States acquired by annexation the Hawaiian Islands; and as a result of the Spanish War, and purchase, it has acquired Porto Rico and the Philippine Islands.*

Sec. 1524. RIGHTS OF THE INDIANS, OR ABORIGINAL INHABITANTS TO THE LAND.—At the time of the discovery of America by Columbus in 1492, the territory of the various States was sparsely inhabited by various tribes of Indians, who were differently organized in the various portions of the country. The organization of the Six Nations in New York probably being the most complete of any, comprising six separate and distinct tribes of Indians. These Indians had communal lands adjoining their villages, very similar to the communal holdings of the early Germans in their semi-barbarous state. Aside from the communal lands the vast forests were held in

*See maps showing the purchases in McMaster's Hist. U. S. Vol. 2.

common as hunting grounds by the tribes, the Indians not having the idea of separate ownership of land except where their wigwams were situated. By reason of this prior possession the Indians claimed to have the sovereign title to the land by the laws of nature.

But when the European nations began to discover and make settlements in the new world they paid little attention to the claims of the Indians, and assumed that the soil belonged to the sovereign of the country in whose name it was discovered, and that the tribes occupying it had no sovereign title, but a mere right to use it, which was similar, if not identical to the feudal doctrine that title belonged to the sovereign, and the inhabitants entitled to the use only of the land.

The question of the Indian's claim to sovereign title to land came before our supreme court and was decided by Chief Justice Marshall in accordance with the prevailing rule among European nations, as follows:

1. That the title to land depends upon the laws of the country in which the land is situated.

2. That several European nations claiming possession upon this continent agreed that the nation whose subjects first discovered any portion of this continent should have title to that portion of the land.

3. The relations to exist between the discoverers and the aboriginal inhabitants were to be regulated by themselves.

4. The aboriginal inhabitants were admitted to have the right of possession of the soil, coupled with the right

to use it; but the right to alienate it was incompatible with the title of the discoverer.

5. The possession and right to use in the original inhabitants did not prevent the nations who held the ultimate title by right of discovery from granting the lands, and the grantee took a good title subject to the Indians' right to use it.

6. The United States upon gaining independence succeeded to all the rights of Great Britain, France and Spain within the limits of the territory acquired.

7. The United States has the exclusive right to acquire the title of the Indians. In other words, no grants made by the Indians to a private individual were good. The Indians could not sell their right to occupy and use the land to a private individual.*

Sec. 1525. RELATIONS OF THE UNITED STATES GOVERNMENT WITH THE INDIAN TRIBES.—The relations of the general government with the various Indian tribes has been somewhat anomalous. While the Indian is regarded as having no paramount title to the land, yet the tribes are considered so far independent as to enable them to make treaties ceding their lands to the general government, and that is about all the independence our government has recognized as belonging to the Indian tribes.

*Johnson v. McIntosh, 8 Wheat. 545, in which case a Choctaw Indian claimed land under the grants of certain Indian Chiefs who were the original occupants of the territory, and the court held as above stated that the Indians could not convey a good title to a private individual as the sovereignty was in the United States Government.

These treaties are made by persons appointed by the President with the consent and advice of the Senate, and are called Indian Agents. The government has thus made treaties with the Indians for all of the North West Territory. In many instances the Indians have reserved a reservation and ceded the balance of the soil. These reservations in many cases were in favor of the entire tribe, but in some cases were in favor of an individual. These reservations are described by their natural boundaries, as water courses, trees, rocks and the like. In surveying the government land the surveyors regard these reservations as impassable territory, and run the line up to them and then around. It is these territories that the government buys from the Indians from time to time and opens up to settlement.

In tracing title to land in an Indian Reservation, the completed title starts with the treaty made with the general government by the Indians, as the sanction of the two as to the land in the reservation makes a perfect title.

Sec. 1526. OF TITLE BY RIGHT OF DISCOVERY AND POSSESSION.—In 1496, the King of England granted a commission under the royal seal to John Cabot, a Venetian sailor, then residing in England, to discover countries then unknown to Christian people and take possession of them in the name of the crown of England.

Possession was then deemed necessary to a perfect title. So that these early explorers would land on the

coast, throw out to the breeze the flag of their sovereign and formally announce that they took possession of the territory for their sovereign.

Two years after receiving his commission, Cabot landed at the 56th degree of north latitude and sailed south along the coast to the 88th degree, formally taking possession of the country lying north of the Gulf of Mexico and running from the Atlantic to the Pacific in the name of the King of England. But it turned out that the French and Spanish monarchs had prior claims to part of the territory, and some of the lands claimed by England by right of Cabot's discovery and taking possession had to be relinquished to prior discoverers. It was a recognized rule that the discovery of the mouth of a river, entitled the discoverer to all the territory drained by that river, so that the entire Mississippi river basin was given up by England by reason of previous discovery.

Sec. 1527. TITLE TO LAND UNDER COLONIAL CHARTERS.—The charters of the colonies differed materially from each other, and land tenures differed correspondingly. Some possessed charter governments, others provincial and others proprietary, as Pennsylvania and Maryland. Yet the colonists claimed as a rule: 1. That they enjoyed the rights and privileges of British born subjects, and that the common law of England was in force in each colony. 2. In all the colonies the land within their limits was held under the original grants and charters in free and common socage,

and not under copyhold or knight service tenures.* They all agreed that the feudal system did not exist in this country, and that the land was held free from all manner of feudal service.

No oath of fealty seems to have been required in this country, but the oath of allegiance has been required in many states because the laws prohibited a foreigner from holding lands. This oath of allegiance takes the place of the feudal oath of fealty. No other services have ever been required, and free socage is an independent holding, if not an absolute holding.†

In this country no ceremony has ever been required or used in the conveyance of land except the livery of seizin.

Sec. 1528. **CESSION OF LANDS BY THE COLONIES TO THE GENERAL GOVERNMENT.**—At the close of the war for independence, the colonies were burdened with a heavy debt, and it was suggested by the several states that the land belonging to them outside the limits of their several jurisdictions should be turned over to the general govern-

*Title in common socage differed from the other feudal tenures in that it was free from many of the feudal burdens and services, the principal burden attaching to it being the oath of fealty to the lord paramount.

†Story, Const. Law, Ch. 17. For all practical purposes our lands are held absolutely, but in theory they are held in free socage. This is shown by the escheat to the State on the failure of heirs; and in the right of the government to take lands for public purposes upon giving compensation by the right of eminent domain. 6 How. 532.

ment for the purpose of paying their share of the public debt, and for the further purpose of having the territory divided up into States to be later admitted into the Union. At this time all the land east of the Mississippi was claimed by one or the other of the original States. Virginia claimed all the North West Territory, but her title was disputed by Connecticut and Massachusetts. These conflicting claims were all settled and the land ceded to the United States Government, except a portion of what is now the northern part of Ohio, given to Connecticut in satisfaction of her claim. This reservation was settled by people from Connecticut under grants from that State, and is still known as the Connecticut Western Reserve.

When the general government acquired this land from the States, it at first sold and transferred large tracts to private individuals and corporations, but soon afterwards it adopted the public land system, which has since been in force.

Sec. 1529. SURVEY OF THE PUBLIC LANDS.—When the public land system was adopted by Congress it was directed that two lines be run through the particular territory to be surveyed, one called the *base* line and the other the *meridian* line. The base line running from east to west, and the meridian line from north to south and intersecting the base line at right angles.

After the base and meridian lines are run, the townships are surveyed beginning at the intersection of the base and meridian lines. The townships are six miles

square, and each township is subdivided into thirty-six sections of six hundred and forty acres each. The townships are numbered with reference to the base line and meridian line. The first township that touches the base line on the north and the meridian on the west would be township one north, range one west. Townships are numbered from the base line north and south, and from the meridian line east and west. So that if the number of the township is given and you know the location of the base line, the location of the township may easily be found.

After the territory has been surveyed into townships six miles square, each township is subdivided into sections containing six hundred and forty acres; these sections are numbered consecutively from one to thirty-six, commencing in the northeast corner of the township and numbering back and forth so that number seven falls under number six, and number twelve under number one, and so on, number thirty-six falling in the south east corner of the township.

The sections are again divided into equal parts by running lines through the center north and south and east and west. A stone or other monument being placed in the center of the section and at each of the corners and at each of the quarter lines. The outside lines are called section lines, and the cross lines are designated quarter-section lines. These are the only lines actually run by the surveyors, though the quarter sections may be again divided.

When a plat of the survey is made in the Surveyor

General's office, each quarter section is again divided into four equal parts by drawing lines through the center north and south and east and west. The quarter sections, containing one hundred and sixty acres each, are designated the northeast quarter, the southeast quarter, the northwest quarter and the southwest quarter of each particular section, and the division of the quarter sections are likewise designated as such parts of the quarter section. So that the full description of a forty-acre strip might be, for example, "The Northeast Quarter of the Northeast Quarter of Section 1, Township 5 North, Range 1 East of the Third Principal Meridian."*

*When the survey of the public lands was made, if the land was open prairie the sections would, of course, be full ones. If the lines run into a lake, the township lines would be run up to the lake and then meandered along the shore. As a result of this there would be fractional portions of sections on both sides of the lake. These fractional sections are surveyed and sold as so many acres of hard land, and no part of the water is included. A rule of the General Land Office requires that in case any quarter section contains less than 160 acres it shall be sold as an entire parcel. If it contains more than 160 acres it shall be subdivided into parcels, and so offered for sale. When a quarter is less than 160 acres a portion of another quarter may be included in the survey. Thus if a meandered lake divides a section so that a portion of the S. W. quarter is less than 160 acres, the survey may include a portion of the S. E. quarter.

If a stream is not meandered the bed is treated as so much hard land and does not affect the survey. 70 Mich. 552; 57 Mich. 241; 8 How. 650; 20 How. 372.

When land is sold by the government the land being desig-

Sec. 1580. SAME SUBJECT—RIGHTS OF RIPARIAN OWNERS.—When the government sells land bordering on a river, or fresh water stream,

nated as the “west half” or the “north half” of a section or quarter section, then the parcel west or north of the center line is conveyed without reference to whether it contains one-half the land in the section or not. It may contain two-thirds of the land in the section or less than one-third, the grantee takes all the land on the designated side of the center line as run by the surveyors, be the same more or less.

But if the deed is between private persons and describes the land as the north or south half without reference to the Government survey, the line dividing the parcel into equal parts would be the boundary line. 70 Mich. 552; 57 Mich. 241; 8 How. 650; 20 How. 372; 127 Mich. 41.

In running lines north and south the lines approach each other towards the north on account of the earth being round. Hence in measuring a township six miles on the south boundary and running directly north the northern boundary will be shorter. The result is that the sections in a township cannot be exactly a mile square, and do not all contain 640 acres. The question then arises as to where these fractional sections fall. In correcting the errors thus caused number 36 is made a full section, and all others are until the west boundary line of the township is reached; and the sections on the west boundary are larger or smaller in their dimensions to make up the difference. In like manner all the difference in the north and south dimensions is corrected in the northern line of the sections. So that almost every section on the west and north of the townships in a government survey is fractional section, and the fraction is made to fall on the north or west side of the subdivision. That is, the surveyor commences on the southeast corner and makes the shortage or surplus to fall on the north or west tier of sections, so that all sections are full except on the north and west sides of the township.

the several riparian owners have a right to use the water in common for all ordinary purposes. If it is a lake or stream of considerable size and irregular shape the right to use any particular portion of the water for a special purpose, as cutting ice, will have to be fixed and determined by a partition suit in equity. In ordinary cases where the lake or stream is small, each riparian owner has the right to cut ice on that portion of the water bounded by the center line of the water and a line drawn from the point where the boundary line of his land touches the water at right angles with the center line, or within the section lines projected into the lake.*

Sec. 1581. SALE OF PUBLIC LANDS.—The public lands are divided into land districts and in each

*62 Mich. 614; 102 Mich. 227; 140 U. S. 191; 118 Mich. 125; 134 N. Y. 305; 18 L. R. A. 695.

This general survey of the government lands was not adopted by a number of States, the lands simply being sold as so many acres in the unsurveyed portion of the government territory, and then a surveyor was allowed to go and locate that number of acres; as a result the various lines frequently overlapped one another and created many disputes as to boundaries. 15 S. W. Rep. 727.

The land department of the government was first established in 1812. At first it was under the supervision of the Treasury Department, but was later transferred to the Department of the Interior, where it has since remained. The head of the department is called the Commissioner of the General Land Office, who acts under the direction of the Secretary of the Interior. The government lands are divided into convenient land districts, in each of which a government land office is established, which are consolidated as the public lands are disposed of.

of these a public land office is established. The officers of the land office are a Register and Receiver. The lands must first be offered at public sale, and sold to the highest bidder, provided the bid is equal to the minimum price fixed by the government. The original price was \$1.25 an acre, except where land bordering on railroads was offered for sale. On the purchase of one of these parcels of land the price is paid to the Receiver of the local land office who issues a certificate of purchase. This certificate entitles the purchaser to a deed or patent to the land from the government, but it is first sent on to the general office at Washington, where the records are examined to ascertain if any mistake has been made. If no errors are detected a deed or patent is issued signed by the President and the Register of the Land Office, and is recorded at Washington and is then sent to the local land office to be there placed on file. This deed from the Government is called a *patent*, this being the term used by the English government for grants of land made by the crown to private individuals.

The title to the land purchased does not vest in the purchaser until the patent has been recorded. In this a patent differs from a deed, as delivery is essential to passing title by deed, but recording of the patent is sufficient to pass title by patent.*

Sec. 1532. SAME SUBJECT—GOVERNMENTAL GRANTS FOR EDUCATIONAL PURPOSES.—The United States Government has made various grants to the various States of public lands for

*102 U. S. 378.

educational and other purposes. Thus, in the North West Territory the sixteenth section in every township was given for educational purposes. Grants have likewise been made for the benefit of Universities and Colleges. And sometimes the States have been given large tracts of swamp land in order to have them drained and made usable.

So, in the various purchases made by the United States, as Florida from Spain, Louisiana from France, and the recent acquisition of Porto Rico and the Philippine Islands, the treaties made, provided that the rights of the private owners of the property in the territory acquired should be respected and confirmed by the United States.

CHAPTER XIV.

COVENANTS OF TITLE.

Sec. 1533. MEANING OF COVENANTS.—

Covenants, or covenants of title have nothing to do with title so far as the conveying or withholding of title is concerned. Though it is a matter of common belief that a *warranty deed* with full covenants of title conveys a better title than a quit claim deed. As a matter of fact, in either case the grantor simply conveys the title which he has, and if he has no title it makes no difference whether he warrants it or not, none passes by the conveyance. So that covenants in a deed have nothing to do with the effect of the deed upon the title immediately. They may indirectly, because if a warranty deed is given and the grantor afterwards acquires a good title, the warranty deed estops him from claiming any title under the new title he has acquired. But the real value of covenants of title, as contained in a warranty deed is that the grantee may have a right of action against the grantor if the title fails.

The usual covenants in a deed are: 1. Covenant of seizin. 2. Covenant of the right to convey. 3. Covenant against incumbrance. 4. Covenant of quiet enjoyment. 5. Covenant of further assurance. 6. Covenant of warranty. This covenant of *warranty* is simply one of the covenants, and a warranty deed may be con-

fined to this one covenant, or it may contain all the other covenants.

Sec. 1534. TITLE DEFINED AND EXPLAINED.—Title is defined to be the means whereby the owner of lands comes into the just possession of his property. A perfect title requires the union of possession and the right to the thing possessed. At the common law the lands could not be conveyed unless the grantor was in possession and could give livery of seizin. It was against public policy to covenant to convey or sell lands when you could not put the purchaser in possession, since it was supposed to stir up litigation and cause a multiplicity of suits. The primary meaning of seizin is possession and the right of possession; its secondary meaning is that of possession alone.

Sec. 1535. THE COVENANT OF SEIZIN.—In a number of the States it is held that the covenant of seizin means possession only, and it is therefore not broken if the grantor is in possession and delivers such possession to the grantee.* So that, under this rule, if the grantor is in possession wrongfully at the time of the making of the deed, there would be no breach of the covenant. But in these States if there is anything in the covenant indicating that the vendor is in possession of a particular title, as an indefeasible fee simple, then there is a breach of the covenant if he does not hold under that particular title.†

*4 Mass. 408; 69 Me. 510; 3 Ohio 510; 27 Ill. 229; 4 Neb. 185.

†11 Cush. 134.

But in most of the States the courts repudiate the Massachusetts rule, and hold that possession alone is not sufficient to satisfy this covenant of seizin, and that it means a covenant of title as well as possession. That is, most of the States hold that a covenant of seizin imports that the grantor is not only in possession, but has the right of possession.† In such States the covenant of seizin is defined to be an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey, following the English rule.‡ So that under this rule the covenant is broken if the grantor has merely an estate tail, or there is an outstanding estate for life or for years.§

But the covenant of seizin is not broken by the existence of an easement which does not affect the seizin of the grantor, such as a public highway or execution lien.¶ The covenant is broken, if at all, as soon as the deed is given, and the statute of limitation governing the right of action for the breach of the covenant begins to run immediately. And the suit for the breach must be brought with the time fixed by the statute of limitation or the grantee cannot recover.

†6 Conn. 373; 3 Vt. 403.

‡11 East 633.

§38 Vt. 469; 23 Conn. 349; Rawle, Cov. of Title, Sec. 59.

¶16 Ind. 338. When the covenant is as to wild lands they are construed to be in the possession of the person holding the government title. So that if the holder of such title covenants that he is well seized of the lands, it is sufficient if the lands are not in the possession of another, and he has constructive possession. 38 Mich. 373; 5 Hill 599; 57 Mich. 219.

When a breach of this covenant occurs and an action is brought, the plaintiff is not required by the course of the common law to aver eviction in his declaration, or to allege any special damages, nor is he required to set up any particulars of the paramount title. All that the plaintiff need do is to negative the title of the defendant. The defendant must plead affirmatively that he had a good title and support such plea by proof. If no proof is introduced the plaintiff is entitled to recover. The reason being that at common law there was no registration of title deeds, and the evidence of title were the deeds that were given from the grantor to grantee, and the grantor was supposed to have in his possession at the time of granting the land all the evidence of title. The grantee, therefore, if in doubt as to his title can bring suit and compel the grantor to show that the title granted is the very title granted in the deed. The burden being upon the grantor, or defendant, to prove affirmatively that the deed he gave was a good and sufficient deed covering the very title which it purported to convey.*

But this rule of the common law has been changed by statute, so that generally it is necessary in drawing a pleading for breach of the covenant of seizin to set forth affirmatively in what manner the covenant has been broken.

Sec. 1586. THE COVENANT OF THE RIGHT TO CONVEY.—The covenant of seizin in those States that follow the rule that it is a covenant of

*14 Johns. 248; 36 Ia. 158; 34 Me. 375.

title and not merely of possession, is equivalent to or synonymous with the covenant of right to convey. But where seizin means possession merely, and the party covenants that he has a right to convey, it is interpreted that in addition to being in possession he has the title.*

The covenant of right to convey is broken, if at all, as soon as made, and is governed by the same rules in regard to pleadings and damages as the covenant of seizin.†

Sec. 1537. THE COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances is regarded in this country as an independent covenant, and is usually worded as follows: "And that the premises are free and clear of all incumbrances whatsoever." When this covenant stands alone it is broken as soon as made, if there exists any incumbrance on the land.

It is sometimes coupled with the covenant for quiet enjoyment, and as the covenant for quiet enjoyment is a covenant in futuro, when the two are thus coupled, it makes of the covenant against incumbrances a contract in futuro.‡ The time of the breaking of the covenant is important on account of the statute of limitation beginning to run from that time. So that if the covenant against incumbrances stands alone, it is broken when the deed is made and the statute begins to run immediately, which is not the case if it is coupled with the covenant of quiet enjoyment, in which case the covenant

*5 Best & Smith 325; 6 Best & Smith 766.

†5 Foster 234.

‡Rawle, Cov. of Title, Sec. 7174.

is not broken until the quiet enjoyment is disturbed, that is, until an action is brought by someone to oust the party.

Sec. 1538. SAME SUBJECT—MEANING OF AN INCUMBRANCE.—An incumbrance within the meaning of the covenant against incumbrances, has been defined to be any right to, or interest in the land, that may subsist in any third person to the diminution of the value of the land, but consistent with the passing of the fee. This covers not only mortgages, execution levies and liens upon the land, but also everything in the way of easements, and the like. The covenant in effect means that the title is not affected by any interest which any third person possesses which may interfere with the possession and enjoyment of the premises.†

As a general rule any lien or right held by a third person which affects the title or use and enjoyment of the premises is an incumbrance within the meaning of the covenant. Thus a tax lien, or a restraint upon building is held to be an incumbrance.*

Certain incumbrances, as a public highway, and the like, are excluded from being a breach of the covenant on the ground that they were not intended to be included within the covenant by either party at the time of executing the deed.†

†42 Mich. 90; 2 Greenleaf, Ev. 242.

*133 Mass. 12; 48 N. H. 475; 4 Biss. 409.

†15 Johns. 483; 118 Mass. 456; 32 Vt. 728; 34 Md. 1; 50 Wis. 620.

Sec. 1539. SAME SUBJECT—EFFECT OF BREACH OF COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances standing alone is broken as soon as the deed is given, if at all, but since it is treated as a covenant of *indemnity* by the courts, the grantee could only recover actual damages. That is, the covenant obligates the covenantor that he will make the title good, and he must reimburse the grantee for what he has been compelled to pay out to satisfy the incumbrance. If the grantee brought suit before satisfying the incumbrance he could only recover nominal damages, since he had suffered no actual damages as yet.† And as only one action could be brought for the breach of the covenant, the recovery of nominal damages would be a bar to another suit after having discharged the incumbrance.§

Where the incumbrance is an easement the covenantee will be entitled to recover such damages as are the proximate consequences of such easement, but he will not be entitled to recover special damages arising because of some particular use which he might make of the land. The rule of recover is not actual damages, but rather the difference between what the property would be worth on the market without the easement, and what it is worth with the easement as it exists.*

If the incumbrance be an unexpired term of years, the extent of that term or the interest upon the purchase

†30 Wis. 341.

§36 Me. 455; 87 Mo. 660.

*39 Ia. 236; 2 Allen 438.

money for the term is the measure of damages. So if the rent which the tenant on the land is to pay amounts to the interest on the purchase price, the covenantee is entitled to the rentals and could recover no damages.§

Where property is sold subject to incumbrances, such incumbrances should always be excepted from the operation of the covenant.||

Sec. 1540. THE COVENANT FOR QUIET ENJOYMENT.—This is a covenant or assurance against disturbances consequent from a defective title. And is a covenant usually found in short leases.* When this covenant is broken by the eviction of the grantee at the instance of the holder of the paramount title, the grantee is entitled to recover, in a number of States, the value of the premises at the time of the eviction.† But the overwhelming weight of authority in other States is that the rule of damages for the breach of this covenant is the same as that for the breach of the covenant of seizin, and that is, the purchase price of the land, and not their value at the time of being deprived of them.‡

§7 H. L. 538; 11 Ohio 120; 68 Pa. St. 400; 39 Calif. 360; 43 Conn. 129; 22 Wis. 503; 19 Mo. 430. In Michigan a covenant against incumbrances is broken immediately if there is an incumbrance against the land which can be then discharged, but if the incumbrance cannot be immediately discharged, the statute of limitations does not begin to run until the incumbrance can be discharged. 52 Mich. 587; 40 Mich. 42.

||10 Conn. 423; 21 Mich. 382.

*11 East 634; 74 Pa. St. 429.

†14 Conn. 214; 12 Vt. 387; 27 Me. 529.

‡41 N. H. 373; 27 Pa. St. 288; 43 Ark. 229; 23 Mo. 166; 18 Nev. 365; 1 Mont. 388; 6 Wheat. 188.

In case of a breach of the covenant for quiet enjoyment in a lease, it was first held that the measure of damages was the amount of the rent paid.§ But this rule has been so far modified by the weight of authority that the tenant is permitted to show the value of the premises at the time of the breach, and can recover actual damages.¶

Sec. 1541. **THE COVENANT FOR FURTHER ASSURANCE.**—The word assurance is the old term for deed, and means the same as the deed or instrument by which the title or additional claim of title is transferred. The grantee is assured by this covenant that the grantor will execute any additional deed which may be necessary to make the title perfect. So that if in the future the grantor obtains a better title than he had at the time of conveying, the grantee may go to him and secure a further quit claim deed, and make him pay the costs of any proceeding necessary to secure such further deed.*

An action at law cannot be maintained for a breach of this covenant until the covenantor has been requested to make such further assurance. But only such acts may be required of the covenantor under this covenant as are *necessary, practicable, and lawful*.† The great advantage of this covenant is that it gives the grantee the power to enforce specific performance of the trans-

§14 Wend. 38; 11 O. St. 120.

¶42 N. Y. 167; 29 How. Pr. 20.

*54 Md. 227.

†L. R. 10 Ch. App. 31

fer of title, where the grantor has subsequently come into possession of a further and better title.†

Sec. 1542. **THE COVENANT OF WARRANTY.**—The covenant of warranty is the most important in a deed in this country. This sweeping covenant of general warranty includes nearly all the other covenants. It dates back to feudal times, and was the covenant which enabled the tenant in tail to bar the entail by a common recovery.

This covenant as usually worded is, that the grantor warrants and defends the granted premises against all claims of all persons whatsoever. It is more than a covenant for quiet enjoyment, being a covenant to defend both the possession and the estate granted in the land, giving the grantee a right to call upon the grantor to make such defense as should be made in case an adverse title is set up.*

This being the only covenant of title in which the grantee can call upon the grantor to defend the title.†

†3 Va. 342.

*40 Vt. 310.

†24 Wis. 23; 124 Mass. 373; 108 Ind. 271; 48 Ill. 271. Thus if there is a general covenant of warranty and a covenant against incumbrances, and a third person who holds a mortgage upon the land brings a foreclosure suit against the vendee of the land. If the covenant only consisted of the one against incumbrances, the grantee could not compel the grantor to come in and defend the foreclosure suit. And if the suit went against the grantee he would have to pay the mortgage and then bring an action on the covenant against incumbrance to recover the amount paid out. But where the general covenant of war-

Upon due notice given to the grantor, when a general covenant of warranty exists, he is obliged to come in and defend the title, or judgment may be taken against him. This notice must be definite and unequivocal, and expressly require the covenantor to appear and defend.† And by statute in some of the states the notice is required to be given in writing.§

The judgment given where the covenantor has been properly notified to appear and defend is conclusive upon him since he thereby becomes either actually or constructively a party to the suit. The general rule is that the judgment of a court does not bind parties who are not parties to the action; notice to the covenantor must be given to bring him out of this rule. So that if he is not properly notified the judgment is not binding upon him.*

But where the covenantor is not notified, and judgment is taken against the grantee in favor of an adverse claimant, the grantee may then bring suit upon the covenant of warranty, and by showing that the title was defective recover judgment against the grantor for breach of warranty. The only difference being that two suits must be gone through with in this case.†

ranty exists, the grantee upon giving notice to the grantor may compel him to come in and defend the suit, and if the adverse claimant prevails and gets judgment, that judgment is conclusive against the vendor so that the grantee may have judgment against him for the value of the premises.

†3 Sarg. & Rawle 410; 6 Mo. App. 588; 24 Wis. 17.

§38 Mich. 132; 16 Wend. 427.

*11 Allen 370; 3 S. & R. 410.

†5 Ohio 158; 51 Ill. 373; 3 Term Rep. 374.

Sec. 1543. SAME SUBJECT—GENERAL AND SPECIAL WARRANTIES.—The covenant of warranty may be *general*, as against the whole world; or *special*, against particular persons. The covenant of warranty may be limited to the acts of the grantor himself, or otherwise limited.

Where the warranty is general the adverse claim must be valid and not a fictitious claim. The covenant is not that no adverse claim shall arise, but that the title is good, though he is obliged to defend against fictitious claims. §

As a rule the covenantor is not obliged to defend against a fictitious title unless: 1. The tortious act is done by the covenantor himself or at his instigation. 2. Or where the covenant is against the acts of some third person specifically. 3. Or the covenant is against all persons claiming or pretending to claim title.*

The covenant of warranty does not extend to the right of eminent domain. The sovereign power has always this right, and it is not a breach of any warranty for lands to be taken by this right. † Nor does warranty extend to cover any other lawful act of the general public. ‡

§102 Ind. 443; 61 Wis. 101; 133 Mass. 59.

*3 Cush. 325.

†57 Ill. 509; 12 Wall. 457; 102 Mass. 19.

‡38 Mo. 305; 4 Douglass 354. The Missouri case growing out of the emancipation proclamation which freed the slaves, the claim being that it was a breach of warranty, where a slave had been sold as a slave for life. It was held that a warranty did not extend to cover any lawful exercise of sovereignty.

Sec. 1544. SAME SUBJECT—WHAT CONSTITUTES A BREACH OF COVENANT OF WARRANTY.—At common law eviction was necessary to a breach of covenant for quiet enjoyment. An eviction at the present time means something of a grave and permanent nature, something more than a trespass. So that it is not necessary at the present time that the vendee should be dispossessed by the holder of the paramount title. If such an adverse claim is set up he may surrender possession or purchase the adverse interest and bring suit against the grantor for breach of covenant. But there must be at least a claim of right of possession by the adverse holder, who must demand possession and threaten eviction. Then, if he has a good title the vendee may surrender possession and look to his warranty. But unless the grantee notify the warrantor he may have the burden of showing that such adverse claim is genuine.*

In every case the holder of the adverse title must assert it in a hostile manner, so that the possession is actually put in jeopardy by the hostile movement of the adverse claimant.

There may be a constructive eviction, as where the land granted is held by a third person, claiming adversely. In such a case the covenantee may maintain his action on the warranty immediately, since he is out of possession and cannot regain it without suit.† But

*4 Mass. 350; 83 Ind. 546; 32 Ia. 76; 3 Dana (Ky.) 164; 17 Ill. 190.

†81 Minn. 368; 48 Mo. 250; 45 N. Y. 499.

if the lands are wild lands, which are presumed to be in the possession of the person who holds a valid title to them, yet if some third person claims such title to the lands it is not sufficient to constitute a breach of the warranty before eviction is attempted.‡

The adverse claim of a third person by reason of which the grantee cannot obtain possession must be under a claim of title, and not merely adversely, as simply because he is in possession.§

Sec. 1545. SAME SUBJECT—WHOM THE COVENANT BENEFITS.—The question arises as to who may take advantage of the covenants of title. The first grantee may, of course, take advantage of them. When he sells the land, what is the effect of the previous covenant? If the covenant is purely personal it does not run with the land, or follow the land to successive purchasers, and therefore cannot be enforced by subsequent purchasers.

Covenants are said to *run with the land* when the purpose is to give future protection to the title conveyed; and not to run with the land, when their whole force is spent in giving assurance against something which immediately affects the title and causes the person damage; that is, present damage.*

Where the covenant runs with the land, the owner for the time being is entitled to the benefits of such war-

‡38 Mich. 373; 54 Miss. 450; 11 N. H. 74; 5 Hill 599.

§3 Ill. 183.

*42 Mich. 90.

ranty. The covenant passing along with the land for the benefit of any subsequent purchaser.

Covenants for quiet enjoyment, warranty, and for further assurance run with the land. While covenants of seizin, right to convey, and against incumbrances do not run with the land.

Aside from the right of action for breach of covenant, the grantee has vested in him any after acquired interest of the grantor by reason of the doctrine of *estoppel*. The grantor is estopped from setting up a superior title if he has not done so when it was his duty to do so, and his subsequent claim would be a breach of duty, so he is held bound by the title which he has previously affirmed.*

*68 N. C. 35; 15 Minn. 58; 20 Me. 262. If the grantor can buy up an outstanding claim, the doctrine of estoppel passes the title to the grantee so as to defeat an action for breach of covenant.

CHAPTER XV.

RECORDING OF DEEDS AND MORTGAGES.

Sec. 1546. RECORDING LAWS PURELY STATUTORY.—In all of the States there are statutory provisions for the recording of deeds and mortgages and all other proceedings and instruments affecting the title to real estate. These statutes are purely local, but are substantially uniform in the various States.

The object of these laws is to give the public notice of the condition of the title to lands, and the statutes which provide for recording declare that the recording shall be notice to everyone of all facts therein contained, and also that any deed or mortgage or other instrument affecting title to land, which has not been recorded as required by these statutes, shall be void as to a subsequent purchaser or incumbrancer in good faith and for a valuable consideration. In most of the states actual notice of the existence of a deed or mortgage is just as good as the constructive notice which arise from the proper recording of the instrument.*

Sec. 1547. RECORDS WHERE KEPT AND HOW ENTERED.—These records affecting title to lands are usually required to be kept at the county seat of the various counties in the State, and separate books

*Rev. Stat. Ohio, Sec. 4143; 35 O. S. 414.

are kept for deeds, mortgages and other instruments, as leases, execution levies, land contracts, and the like. The statutes also provide that separate books be kept for the entry of deeds and mortgages for record before they are actually recorded, and they are effective from the moment of such entry for record. The entry book being a mere memorandum of the names of the parties, grantee and grantor, and that the instrument has been left for record, it is later copied at length in the regular record book of deeds or mortgages. The entry books show the day, hour and minute at which the instrument was left for record, the names of the grantor and grantee, the town, city or village, where the lands conveyed are situated, as well as a sufficient description of the lands as to enable any one to locate them. The deed or mortgage is then regarded as recorded, giving public notice to all of its contents, from the moment of this entry for record, or of its being left for record with the Register or Recorder for entry.*

It is held that the entry in the preliminary register book of the names of the grantor and grantee and other facts necessary to be therein stated, will cure an omission of these facts when the deed or mortgage is recorded at length, as the abstractor is presumed to look at the entry book when the names are omitted in the record.†

*Rev. Stat. Ohio 4133.

†44 Mich. 125; 14 Mich. 361. The register is obliged to simply record what is on the face of the instrument, nothing else, so that where there is no seal to the instrument and the

Sec. 1548. EFFECT OF MISTAKE IN RECORD.—A subsequent purchaser of land has the right to rely upon the records as showing the exact facts, unless he has received actual notice that the record is incorrect. In some states the person or persons procuring an instrument to be recorded are held responsible for all errors in the record, on the principle that the recording officer acts as an agent of such person or persons.* But this rule does not prevail in other States, where it is held that the Register or Recorder is a public officer and not the agent of any individual having an instrument recorded.†

The purchaser is not charged with the contents of the deed or mortgage further than such contents are contained in the record. Thus it has been held that when a mortgage was recorded for less than its actual value, it was only notice to the amount stated in the record.‡ And where the record omitted the name of one of the subscribing witnesses, the record was held to be no notice at all, because without the witnesses required by the statute the instrument was not entitled to record, and if

statute requires one, the instrument is not entitled to record, and a memorandum that there was no seal on the recording of the instrument would not aid the instrument. The record implies a seal as the instrument is not entitled to record where it is absent. It should be indicated in the record with a scroll. 128 Mich. 162.

*29 Mich. 162.

†19 Ill. 486; 35 Ala. 23; 1 A. K. Marshall (Ky.) 306.

‡1 Johns. 288.

not entitled to record the defective record was not a sufficient notice.*

In some states a different rule prevails and it is held that when a valid instrument is left for record, and the person leaving the instrument has complied with all the requirements of the statute, and by reason of an error of the recording officer the instrument as recorded is defective, the error thus made will not be chargeable to the person having the instrument recorded, and he is entitled to have the instrument give notice as it actually is and not according to the defective record.†

Where the statute prescribed what formalities are necessary to the execution of a deed, as two witnesses under seal and the like, a failure to observe these requirements make the instrument incapable of being recorded, and though recorded in fact it gives no notice to the public. The reason is that the provision for this constructive notice is purely statutory, and unless the requirements are observed the instrument not being entitled to record can give no notice.

The object of recording laws is to give the public notice of the title to land within the jurisdiction covered by the recording office. But it is not made exclusive notice so that actual notice may not be shown. A purchaser having no other notice than that of the record is entitled to rely upon it, if the instrument was entitled to record, as the statutes declare that every conveyance of real estate hereafter made which shall not be recorded

*5 Minn. 323; 13 Mich. 367; 6 McLean 15; 14 Mich. 361.

†19 Ill. 486; 35 Ala. 23; 1 Marshal (Ky.) 126.

shall be considered void or fraudulent against any subsequent purchaser in good faith and for a valuable consideration whose conveyance shall be first recorded.*

Sec. 1549. **PROOF OF TITLE FROM RECORDS.**—Title to land may be proven from the records in two ways: 1. The records themselves may be brought into court and introduced in evidence, which is the usual way where the records are of easy access. 2. By a certified copy of the records, which may be introduced with the same effect as the originals. But if any of the records are of instruments which are not so executed as to be entitled to record, they cannot be admitted and have no effect, so that the chain of title would fail, as where the instrument has no seal, and one is required by the statutes.

Sec. 1550. **SUBSEQUENT PURCHASERS' RIGHTS.**—The recording laws being for the protection of subsequent purchasers, by providing a method by which any one may ascertain the true state of the title to any parcel of land, it is always held, that the holder of a prior unrecorded deed is defeated by the holder of a later deed procured in good faith and caused to be recorded before that of the other. But such subsequent purchaser in order to be protected must not only have no notice by virtue of the records, but must also be a *bona fide* purchaser for a valuable consideration, and without actual notice of the prior deed. The party

*42 Mich. 175; 47 Mich. 105.

relying on the older deed must show that the subsequent purchaser had actual notice of his claim.*

Sec. 1551. A MORTGAGEE IS REGARDED AS A PURCHASER UNDER THE RECORDING LAWS.—Within the meaning of all recording laws a mortgagee, or conditional owner, is regarded as a purchaser. At the common law a mortgagee was the owner of a conditional estate, that is, one liable to be defeated upon the happening of the event, or payment of the sum designated prior to the day fixed. At the present time the title to the mortgaged premises does not pass to the mortgagee by virtue of the mortgage deed, the mortgagee having simply a lien upon the land to satisfy or secure his loan. But, nevertheless, within the meaning of the recording laws the mortgagee is regarded as a purchaser, and has the same rights as against subsequent purchaser as a grantee in a deed would have. In this regard some distinction is made between a mortgage given to secure a pre-existing debt, and one in which the consideration has been given at the time of the execution of the mortgage; the former not being regarded as a mortgage for value within the recording acts, while the latter is.†

Where a mortgage is given and part of the money which it secures has been advanced to the mortgagor

*22 Mich. 410; 47 Mich. 102; 36 Mich. 363; 59 Mich. 590; 1 Walker Ch. 263. Notice to the agent is held to be notice to the principal in such cases. 22 Mich. 268.

†26 N. J. Eq. 445; 65 N. Y. 167; 23 Ill. 579; 48 Miss. 268; 26 Mich. 410.

on the presumption that the title is all right, and before the rest is paid, the mortgagee receives notice of a prior title—he is not justified in making any further payments to the mortgagor; and if he does so his mortgage as to such further payments will be regarded as subsidiary to the title of which he has received notice.*

*24 Mich. 360; 14 Mich. 154; 52 N. Y. 136.

CHAPTER XVI.

OF ABSTRACTS OF TITLE.

Sec. 1552. IMPORTANCE OF SUBJECT.—

One of the most important duties an attorney-at-law is called upon to perform is that of giving an opinion upon the title to real property. To be in a position to pass upon titles the lawyer should be familiar with both the common law and statute law as regards real estate, and especially that branch of the law which refers to the execution and recording of deeds and mortgages and other instruments affecting title or constituting liens thereon. While the statutes regarding the execution and recording of conveyances are very similar in the various States, they are not uniform.

Sec. 1553. ABSTRACT OFFICES.—In all the older settled portions of our country, and in the counties having a large population, the records have become so voluminous, that individuals or corporations have established what are known as Abstract Offices, which undertake, for remuneration, to furnish abstracts of title to real estate in the jurisdiction. In some cases these abstracts of title are guaranteed by the person or company making them, and in the large cities this class of work is done almost solely by the large corporations, who guarantee the abstracts they furnish. The value of such abstracts depend wholly upon the care with

which they are made. And, as a general rule they are unreliable, because they are not full and complete enough. They are of assistance in examining the title by one who desires to go to the original records. When such an abstract is given an attorney to base his opinion of the title to the land thereon, he should state that the opinion is based only upon the conveyances shown in the abstract. If the client desires a correct opinion, the lawyer should use the abstract simply as an index to the records to be examined, and frame his opinion from a careful examination of the original records and upon the legal sufficiency of each conveyance therein.

Sec. 1554. METHOD OF EXAMINING TITLE.—When called upon to investigate the validity of a title it is always advisable to procure an abstract of the title as a foundation for the work. Then write out carefully a description of the property, the title to which is in question. This description should be compared with each description in the line of conveyances to ascertain if the land is included therein. If it is a description by metes and bounds a diagram of the property showing the direction and distance of each line will be helpful. The descriptions will often be found imperfect and impossible ones, and incomplete in giving all the boundaries, and these defects should appear in the abstract, and be rectified if possible.

In tracing the title from the original grant, the abstractor may trace the title from the original grantor without any reference to any incumbrances placed upon the land by the various owners while in their possession,

and then afterwards make an independent examination of these liens. Or, he may trace both the title and the liens thereon at the same time from the original grantor, step by step.

When an undischarged lien is discovered, the question arises as to whether or not it may be outlawed. If not, it is a cloud upon the title.

When there is an uninterrupted chain of title from the original grantor to each successive grantee, and the title has been transferred *inter vivos* by deed, the tracing of the title is very simple. But this is not usually the case, and it will be found that the property has been sold through the probate court or on execution to satisfy debts. In such a case it may be necessary to examine into the jurisdiction of the court, and the proceedings had, to ascertain whether they are regular and in accordance with law, and whether the sale of the property was regular and according to the order issued. While the middle names of the various grantors do not matter, yet it is important to see that the first name is the same as that of the party to whom the property was deeded.

The abstractor should examine each deed to ascertain if it has been properly executed and acknowledged in accordance with the law in force at the time of its execution, which may involve the question of satisfying the law as regards revenue stamps. The covenants of the deed should be examined also to ascertain if any easements are outstanding.

As to the dower interest of the husband or wife, the

deed, unless executed by both husband and wife, may be subject to an outstanding dower interest. And this is so though the acknowledgment recites that the grantor is single, since such a recital is no part of the deed. The abstractor must ascertain whether or not the grantor was single at the time or not, and if he does not know, the fact should be so stated in the abstract.

When there is a break in the title caused by the death of the owner and the sale of the property, or its distribution under the laws of descent to the heirs, it may be necessary to examine the records of the probate court with reference to the number, names and ages of the heirs, where the owner died intestate. Because if the owner died intestate his lands are divided among his heirs according to the provisions of the statute, each in his proportionate share. And where some of the children are dead and left issue, the issue will inherit under the statute. Where the owner leaves a will, and it is not contested, the land passes according to the provisions of the will.

Where the property of an intestate owner has not been sold the abstractor will often find that it has been partitioned, in a legal proceeding, among the heirs. When this is the case it is necessary to see that the proper steps have been taken, and that the property was by this proceeding given to the person through whom the title comes. But as the lands of a deceased owner pass to the heirs without administration or other proceeding, it may be sufficient if they have simply united in a transfer to the next grantee.

Where there has been no probate proceedings, then the abstractor must ascertain whether or not there has been any other judicial determination as to the number of heirs. By statute persons interested in the land may institute proceedings in order to determine who are the heirs of a deceased person where there is any doubt about it. In all such cases the abstractor should note the number of heirs that were named, and state that the record does not disclose whether there are any more heirs or not.

The break in the chain of title may be occasioned by a foreclosure of a mortgage, in which case the abstractor should see that the proceedings complied with the statutes governing foreclosures, as to advertising the sale and the like, for if these have not been complied with, the sale is void, and no title passes to the purchaser, unless he has gone into possession and retained such possession the statutory period to obtain title by possession.

In case there has been a foreclosure in equity, the abstractor should ascertain whether the court has acquired jurisdiction of the person made defendant, for if it has not the proceedings are void.

So in all cases where the title has been transferred by an attorney in fact, it should be seen that the power of attorney has been properly executed, and that the attorney in fact exercised the power given, and no other. Both the power of attorney and the deed should be recorded.

In tracing the incumbrances and liens placed upon

the title by the various owners, the abstractor may have more difficulty than tracing the title proper.

If there is a mortgage upon the land, and it has been paid, it should be discharged of record, or it still shows as an outstanding obligation, and constitutes a cloud on the title. It will be found that a great number of mortgages have been paid and satisfied in fact, yet have never been discharged or entered on the record as satisfied. Thus a party owing a mortgage will pay same and neglect to have the proper entry of the cancellation of the mortgage put upon record. Such mortgages may be subsequently discharged by the mortgagee entering upon the record that the mortgage is discharged; or the mortgagee may execute a release of the mortgage under seal and have it recorded. But where the mortgagee is deceased and the mortgage with the satisfaction is lost, suit to remove the cloud from the title may be necessary.

Where the land has been sold under an execution, it should be ascertained from the records whether there has been a valid judgment rendered, for without this there can be no valid execution and sale. If there is an execution levy it must be enforced in most States within a certain number of years, and in all States within the life of the judgment.

The abstractor is also required to examine what taxes have been assessed against the land, and whether there are any outstanding tax titles. Also ascertain if any special assessments or taxes have been levied for municipal purposes if the land is situated in a city or town.

Sec. 1555. LIABILITY OF EXAMINER OF TITLE.—One who makes an examination of title to land, and gives a certificate as to it, is not an insurer of the title; but becomes responsible for mistakes made through ignorance or want of care and legal knowledge. The general rule being, that one who holds himself out as capable of doing certain work, must possess the ability and exercise the care required, and is responsible for injury suffered by reason of his inability to do so.*

*70 Ill. 268; 4 Mo. App. 108.

BOOK II.

THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS AT COMMON LAW.

CHAPTER I.

THE SUBJECT INTRODUCED.

Sec. 1556. IMPORTANCE OF THE STUDY OF THE EARLY ENGLISH COMMON LAW PLEADING.—While the early common law system is no longer in use in an unmodified form, yet it is vitally connected with the development of American and English law to-day, and its study must ever be the foundation of a legal education. The remedial law of England was developed and enlarged through the medium of special pleading, so that the advances in the conception of rights are frequently associated with, if not the direct result of the like advances in the forms of pleading.

Again, the study of the common law system of special pleading is not only essential to the correct understanding of the historical development of the common law, but it is likewise an admirable and beneficial aid in intellectual training. It is said that no one can be

a strong lawyer who has not, in addition to natural or acquired logic, a clear knowledge of the logic of the law, and special pleading is regarded as the logic of the law.*

So issues cannot be properly presented for decision, either by court or jury, unless, in the first place, the litigants through their counsel, are capable of clearly conceiving the proposition of fact or of law upon which their claims rest. There must be a lucid and concise expression of those propositions. Such expressions must be relevant, and, so far as possible, single. After the propositions have once been stated, there must be no departure from them. A litigant must be compelled to pursue a definite and consistent course from the time he comes into court until he obtains his judgment. All of this, and much more, the litigant or his counsel acquires from the rules and principles of special pleading, developed by centuries of experience in the trial of causes at the common law. Under modern code pleading the tendency is away from special pleading, but the rules there devised for the development of a single and plain issue of law or fact must ever be regarded. And while the mistake of the pleader may now be easily remedied by amendment, and the consequences of the mistake are not so serious as at common law, yet it behooves the pleader to be familiar with the rules of pleading for his reputation's sake.

Sec. 1557. OF REMEDIES AND THEIR APPLICATION.—The vital principle of all systems of

*Perry's Common Law Pleading 2-4.

laws is that a remedy must be given for every violation of right. But it is only for the violation of a legal right that a remedy or remedies are given. One may suffer great loss, or moral injury, and yet have no legal right violated for which he could have relief or vindication. In such cases it is said to be *damnum absque injuria*, and before any remedy will exist resort must be had to legislation to cover the particular case, and when they sanction the right, they do so by providing a remedy for its infringement.

In a state of nature, where neither rights or remedies are recognized, that is, rights and remedies as enforced by law, each individual would undertake to redress his own wrongs and protect his rights. This method of redress by the individual's own act is still permitted to some extent, and is called *self-help*. This sort of help or remedy may be classified as, 1. By the sole act of the party injured. 2. By the joint act of all parties concerned. By reason of the violence with which the redress of wrongs by individuals has always been accompanied, the progress of civilization has been marked by the restrictions placed upon this sort of remedy and the enlargement of the class of remedies applied through the instrumentality of persons not interested in the injury, as tribunals and judges, established for the purpose.

Self-help by the act of the party injured is still permitted to some extent, thus a party is allowed to do certain things in self-defense. This includes not only the defense of one's person, but also the mutual and re-

ciprocal defense of such as stand in the relation of husband and wife, parent and child, and master and servant. But the resistance must not exceed the bounds of mere defense and prevention, as otherwise the defender would himself become the aggressor.

Recaption of persons or goods is another right which a person may employ, when he has been deprived unlawfully of his goods, or is wrongfully separated from his wife, child or servant. The recaption must not be in a riotous manner nor attended with a breach of the peace.

So a person may enter upon lands, the possession of which has been unlawfully taken away from him, but such entry must likewise be peaceable.

A person may also abate nuisances, provided it can be done without a riot or breach of the peace.

An individual has also a remedy by distress, which is the summary taking of personal chattels out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction of the wrong committed. Thus, at the common law, a distress might be taken for, non-payment of rent in arrears; neglect to do suit to the lord's court, or to perform certain other personal service; for amercements in a court-leet; for injury by beasts wandering about *damage feasant*; and for certain penalties prescribed by act of Parliament. The distrainer could only take the chattel into custody, and was not permitted to make any use of it, and was obliged to take reasonable care of it. He was in a sense an officer of the law, and as such held the chat-

tel to answer the damage done. If the distress was illegal, the distrainor made himself liable to the owner in an action at law.

Self-help by the joint act of all parties concerned, includes:

1. *Accord*, or commonly called *accord and satisfaction*, by which is meant an agreement between the parties that the wrongdoer shall do or give to the party injured something in satisfaction of the injury, which agreement is followed by due performance. This performance duly accepted effaces the injury.

2. *Arbitration*, by which is meant the submission, under mutual agreement of the parties, of the controversy to two or more persons mutually agreed upon, called arbitrators, who are to decide it. The decision of the arbitrators, called the *award*, effectually determines the rights of the parties, except that it cannot transfer title to realty. But in such cases, as well as in many others, the parties give bond to perform the award, and a failure to do so is a breach of the bond.

There are two remedies which come about by the sole operation of law. These are:

1. *Retainer*, by which a creditor who has been made executor or administrator of his debtor's estate, is entitled to retain so much of the estate as will satisfy the debt owing to himself before he pays any debts of equal or inferior grade. The reason for this was that the administrator could not sue himself, and there was no one else to whom he might look for the satisfaction of his claim.

2. *Remitter*, by which is meant that where one is wrongfully in possession of land or other realty, under a defective title; or is out of possession though having a good title, and subsequently gets a good title, or gets possession under a defective title, by operation of law the title is *remitted* or sent back to his more perfect title, and the imperfect one disappears.

Sec. 1558. OTHER REMEDIES ARE APPLIED THROUGH THE INSTRUMENTALITY OF COURTS.—Where for the redress of an injury there is required the concurrence of the act of the party or parties, and the operation of law, courts are required.

A *court* is an institution of the State the purpose of which is to ascertain facts material to the controverted rights of parties, and to pronounce the legal effect of those rights.

The interposition of the court or courts is secured by means of an *action* or *suit*, which is “nothing else but the demand of right,” or a proceeding by which is sought the decision of the court of justice upon a right litigated between the parties.*

The act of at least one of the parties litigant is required to set the law in motion, and the process of the law is usually the only instrument whereby the parties are able to secure certain and adequate redress of in-

*This definition is from the *Mirror*, a very ancient legal treatise. An action is also defined as, “that formal course of proceeding, which a person seeking to enforce a right, is by law bound to adopt.” “Action at Law,” J. W. Smith 41.

juries. Even where the law allows an extra judicial remedy, the ordinary remedy awarded by the court is not excluded.

Sec. 1559. CLASSIFICATION OF COURTS AS REGARDS THE KEEPING OF RECORDS.

—Courts may be regarded as of two classes as regards the keeping of their records. These are: 1. Courts not of Record. 2. Courts of Record.

1. A court not of record is one of whose proceedings no solemn contemporaneous minute is made by a sworn officer. Its proceedings are not enrolled or recorded, and they are regarded as matters of fact to be tried and determined by a jury, if a dispute arises concerning them.

2. A court of record is an organized judicial tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common and statute law. The acts and judicial proceedings of such courts are recorded for a perpetual memorial. The records are called the records of the courts, and import absolute verity. Nothing can be averred against them, nor shall any plea, or even proof be admitted to the contrary. If the existence of a record be denied it shall be tried by itself, that is, by an inspection thereof by the court to ascertain whether or not it is a properly authenticated record.

Sec. 1560. CONSTITUENT ELEMENTS OF A COURT.—Every court is composed of at least three constituent elements, as follows: 1. The *actor* or plain-

tiff, who complains of an injury done. 2. The *reus*, or defendant, who is called upon to make satisfaction for it. 3. The *judea*, or judicial power, who is to examine the accusation, to determine the law applicable to the premises, to find whether or not an injury has been done, and if so to ascertain, and by proper officers and machinery apply, the remedy.

Anciently rights and remedies were mere incidental results of form and procedure, but as systems of law developed, substantive rights and duties grew in importance, and mere form became of less significance, until now in the most highly developed systems of law, form is regarded only sufficiently to secure convenience and certainty in the administration of law and justice.

Sec. 1561. JUDICIAL MACHINERY UNDER THE ANGLO-SAXONS.—The Anglo-Saxon procedure in administering justice was very completely decentralized. The several counties of the kingdom each did separately and finally its own judicial work. Appeals were discouraged, and the administration of justice was crude and simple. At the head of each county, or *shire*, was a judicial officer called the "Shire-reeve," of whom our Sheriff may be regarded as the lineal descendant.

Sec. 1562. THE ADVENT OF THE NORMANS IN ENGLAND INTRODUCED A CENTRALIZED JUDICIAL SYSTEM.—With the advent of the Normans in England led by William the Conqueror, was introduced a highly centralized system of tribunals for the administration of justice, in which

the Grand Justiciar controlled absolutely. The Conqueror proceeded cautiously with the introduction of his system, not depriving the Anglo-Saxon tribunals of their jurisdiction, except as to criminal offenses of the clergy, and made it profitable for litigants to come into his court through the introduction of appeals from the lower court. The *Wittenagemote*, or council of wise men, of the Anglo-Saxons, was superseded by his highest court, called the *Curia Regis*, or King's court. This was attached to the King's person, was held in his palace, and followed him wherever he went, being the embodiment of royal justice administered by the king in person. This court had unlimited jurisdiction, and entertained appeals from all inferior courts.

Sec. 1563. ORIGIN OF THE COURT OF EXCHEQUER.—From about 1100 A. D., the Court of Exchequer appears as a distinct court. This court was composed of some of the King's principal officers of finance, and sat to receive the sheriffs and all other accountants and collectors of the crown, and to give acquittance to those who paid, and to issue writs and orders to enforce payment from those in default. By the development and use of various fictions the jurisdiction of the court became extended until it tried almost all classes of controversies between even private suitors.

Sec. 1564. INSTITUTION OF JUSTICES IN EYRE AND ASSIZES.—As the superior efficiency of the *Curia Regis* became recognized, it came to be overrun with suitors, so much so that in 1170 King Henry II appointed justices to go about the kingdom

and hear complaints in the various counties or districts. These justices were called Justices in Eyre, and this was the origin of the judicial circuits which continued from this time on. Henry II also instituted the Assizes, whereby litigants were enabled to escape the jurisdiction of the local court, with its ordeal of battle, and refer themselves to the judgment of the King's justices for the trial of their causes.

Sec. 1565. ORIGIN OF THE COURT OF COMMON BENCH OR COMMON PLEAS.—

The increase of suitors in the Curia Regis increased the inconvenience caused by the court's following the King from place to place, and became a subject of great complaint, so that in 1215 King John was compelled to promise among other things in Magna Charta, that common pleas shall no longer follow the court, but shall be held in some place certain. Thus arose the Common Bench, or Court of Common Pleas, which was established and held at Westminster, and there remained until the consolidation of the English courts under the Judicature Act of 1873.

Sec. 1566. THE COURT OF KING'S BENCH.

—The great, and to some extent, arbitrary powers of the King's chief justices caused much dissatisfaction. In a contest between rival chief justices, as a result of which both lost their offices, one by death, the other by resignation, the Curia Regis lost its administrative functions. No successors to the chief justices were appointed, but instead a chief justice for holding pleas

before the King, from which arose the court of King's Bench, about the year 1268.

Itinerant justices, or Justices in Eyre, were first appointed in 1170, and in 1179 all England was divided into four circuits, and five justices were appointed for each. These included the six justices of the Curia Regis. About this time trial by inquest, the origin of the present jury trial, and the great Assize were introduced. By means of the itinerant justices and the Assizes all issues of fact involved in the royal courts at Westminster could be determined in the respective counties where the causes arose, thus avoiding the expenses of taking the witnesses and jurors up to Westminster. The verdicts rendered in the several counties at the assizes were certified back to the appropriate Westminster courts for judgment, thus keeping the administration of judicial matters as completely centralized as when first introduced by William. After 1385 no more Justices in Eyre were appointed, circuits were thereafter perambulated by the judges of Assize and Nisi Prius (unless sooner), the latter so called, because the writ to the sheriff of the county wherein the cause arose commanded him to have at Westminster on a day certain, a jury of the body of his county for the trial of the cause "unless sooner" the court or some of its judges went down to the county there to try the question of fact.

Sec. 1567. JURISDICTION OF THE COURT OF KING'S BENCH.—The Court of King's Bench was the remnant of the Curia Regis. Like that great court, it purported to be presided over by the King in

person, although for centuries the King took no part in its deliberations. It possesses the residuum of the ancient jurisdiction of the Curia Regis which was not allotted to the other courts. Its judges are by their offices the sovereign conservators of the peace, and it has thus jurisdiction of all criminal matters, and all civil actions where the wrong alleged is criminal in its nature, as trespass, or other injury *vi et armis*, conspiracy, deceit and the like. By fictions it extended its jurisdiction to almost all cases except those involving title to land. It is a court of record, and also a court of appeal into which may be removed, by writ of error, all judgments of the Common Bench, and of all inferior courts of record in England. It also superintends all civil corporations, and commands by mandamus magistrates and others to do what their duty requires in every case where there is no other specific remedy.

Sec. 1568. JURISDICTION OF THE OTHER COURTS.—The Common Bench or Court of Common Pleas, is a court of record. It was originally the great common law tribunal which acquired exclusive jurisdiction of pleas or causes between subject and subject or private persons. It also retained its exclusive jurisdiction of real actions, and was styled the lock and key of the common law.

The Court of Exchequer was a court of record, and was originally concerned with the accounts of the King's collectors, but enlarged on this jurisdiction in matters of accounts and the like.

The Court of Exchequer Chamber was an exclusively

appellate court, composed of the judges of any two of the great Westminster Courts, sitting to revise judgment of the third.

The House of Lords is the supreme judicial tribunal of England. It is the court of last resort in all civil actions. When sitting as a court, only those peers sit who are versed in the law, known as the "Law Lords," many of whom have filled high judicial stations, and in many cases have been advanced to the peerage by reason of their high eminence in their profession.

Among the courts not of record, below the Common Bench, may be mentioned the County Court, which was a court incident to the jurisdiction of the sheriff. It could hold pleas of debt or damages when the amount involved was under forty shillings. Below this was the Hundred Court, the Court Baron, and the Piepoudre Court, all of which are fully explained by Blackstone.*

Sec. 1569. CONSOLIDATION OF THE ENGLISH COURTS BY THE JUDICATURE ACT.

—In 1878 the English courts of common law, and all the superior courts were merged into a Supreme Court of Judicature, which consisted of two permanent divisions, as follows: The High Court of Justice, and the Court of Appeals. An appeal will lie from the High Court of Justice to the Court of Appeals, and from the Court of Appeals to the House of Lords. In the House of Lords, appeals are heard before the Lord Chancellor, Lords of Appeal in Ordinary, and those peers who

*§ Bl. Com. 32-58.

have held high judicial offices, and not by the entire body of peers. Three Lords of Appeal must be present to hear every case.

The High Court of Justice has original jurisdiction with appellate jurisdiction from the inferior courts. It consists of five divisions, as follows: 1. The Chancery Division. 2. The Queen's (or King's) Bench Division. 3. The Common Pleas Division. 4. The Exchequer Division. 5. The Probate, Divorce and Admiralty Division.

In 1881, the Queen's Bench, Common Pleas and Exchequer Divisions were united into one court, called the Queen's Bench Division, so that at the present time there are in England this court, and the two others above mentioned, with the Court of Appeals and the House of Lords.

Sec. 1569a. ORGANIZATION OF COURTS IN THE UNITED STATES.—In the United States the courts may be divided into two classes: Federal Courts, and State Courts. The first organized under acts of Congress by the National Government, and the others by act of the various legislatures under the State constitutions. These courts have been already considered in Volume II of the Cyclopedia of Law, under the subject of Constitutional Law.

Sec. 1570. OF THE VARIOUS KINDS OF JURISDICTION.—Jurisdiction means the power to adjudicate, or the power to hear, investigate and determine a cause of action. So that when it is said that a court has jurisdiction it means that it has power to en-

tertain the suit and decide it. The jurisdiction of our courts is determined by the Constitution and the Legislature. The jurisdiction of courts may be classified as follows: 1. Original. 2. Appellate. 3. Exclusive. 4. Concurrent. 5. General. 6. Special. 7. Limited. 8. Territorial.

1. Original jurisdiction is that which is invoked at the commencement of a suit, and is distinguished from—

2. Appellate jurisdiction, which reviews, corrects, and revises the proceedings in a cause already begun in some other court.

3. Exclusive jurisdiction is where the consideration of the subject matter belongs solely to the court exercising it, or which gives to one tribunal the sole power to try the cause.

4. Concurrent jurisdiction is that which is possessed over the same parties or subject matter at the same time by two or more separate tribunals. In such cases the court first exercising the jurisdiction tries the cause.

5. General jurisdiction is where the courts entertain jurisdiction of all matters of a civil nature, even if they be limited as to parties.

6. Special jurisdiction means that the courts having it can only take jurisdiction upon the special matters which the statute has specially conferred upon them, and the statute itself defines these special matters.

7. Limited jurisdiction, where the courts are generally limited and confined by the subject matter, or the character of the subject matter, or by the parties.

8. Territorial jurisdiction means the limitation of the

court's jurisdiction as regards the extent of territory within which it is to be exercised.

In England the courts having appellate jurisdiction were: The King's Bench, Exchequer Chamber, and House of Lords.

In the United States appeals lie from the common pleas court to the higher courts in their respective order.

Sec. 1571. SCOPE OF THE SUBJECT OF PLEADING.—The word plea, or pleading, is used in various significations; thus it may mean to litigate or carry on a suit or action. In a stricter sense it means that part of an action consisting in the allegations of the respective parties. And in a more strict sense to make an allegation of fact in a cause. And in its most limited sense, a *plea* is the allegation of fact made by the defendant as an answer to the *declaration* of the plaintiff in an action. But the expression, *pleading*, as a branch of the law, or when coupled with the word *practice*, as pleading and practice, means more than the draughting the usual forms of written statements of the respective parties in a suit; more than the statements themselves, and the oral advocacy of a cause in court, and may be said to include the whole science of conducting a cause from its commencement to its finish; thus the selection of the proper tribunal, with the requisite jurisdiction; the choosing of the appropriate form of action; making of the essential allegations to constitute the wrong complained of or a good cause of action; the application of the rules of correct pleading in the formulation of the issue to be submitted to the tribunal,

as well as the observance of the various rules of court providing the method of commencing, conducting and terminating a suit at law.

Sec. 1572. **AUTHORITIES ON THE SUBJECT OF COMMON LAW PLEADING.**—The rules of the common law applicable to pleading are recognized in every State where the common law system still prevails, and are the basis of all pleading, even under the Civil Codes, which abolish special forms of action and otherwise simplify the method of procedure in the trial of a cause. Hence we find the English authorities on common law pleading, with American notes, among the leading authorities here. Among these may be mentioned the works of Chitty and Stephen; the former work having reached its 16th American edition, and the latter being re-edited by a number of authors, as Heard (1867), Tyler (1871), Andrews (1901). Books of practice with rules of pleading and forms are to be found in almost every State, and these, on account of being particularly adapted to the special practice prevailing in the State, are usually purchased by the profession. It is unnecessary to name these authors here, as their works may be found by reference to any law publisher's catalogue. An *Encyclopedia of Pleading and Practice*, in twenty-three volumes, is published by the Edward Thompson Company.

In the Code States, that is, those States having adopted the code of civil procedure, the subject of pleading is simplified by doing away with all special actions, and having but one form of action for all causes, styled

a civil action; providing that litigants be called plaintiff and defendant, and abolishing feigned issues. A number of authoritative books on Code Pleading have appeared, among which we mention those of Bates, Bliss, Abbott, Maxwell, Phillips and Pomeroy.

CHAPTER II.

OF FORMS OF ACTION AT COMMON LAW.

Sec. 1578. GENERAL CLASSIFICATION OF ACTIONS.—The most ancient classification of actions is into *real, personal and mixed*. From the earliest times the *actor* or plaintiff had to make a statement of the wrong complained of with a claim for redress in a civil action. These formal assertions came, at an early period, to group themselves into actions for a debt; actions for movables, and actions for real property. In addition there were those actions which involved criminal matters, which were called *pleas of the crown* at common law, as distinguished from civil actions, called *common pleas*.

With the introduction of the Curia Regis of the Normans, jurisdiction was given by King's writ, which issued out of the Chancery, by reason of which the formal actions were added to, and yet the rigor of the previous actions were not lost sight of, and after a time the same system of precedents prevented the Chancellor or his clerks from issuing any but the formed writs, and this continued until the Statute of Westminster II (13 Edw. I, Ch. 24) was passed authorizing the issuing of new writs.

We shall first consider briefly the formed actions which had developed previous to this statute, and which were divided into real, personal and mixed actions.

Sec. 1574. THE FORMED ACTIONS DEFINED.—Real actions are those brought for the specific recovery of lands, tenements and hereditaments.

Personal actions are those brought for the specific recovery of chattels, or for damages or other redress for breach of contract, or for other injuries of any description except those redressed in real actions.

Mixed actions are those brought for both the recovery of realty and damages for injuries sustained in respect of such property.

Owing to the backward condition of commerce and manufactures in the early history of the law, land and its immediate products for a long time constituted almost the entire body of wealth, so that real actions were of relatively greater importance than the others.

Sec. 1575. KINDS OF REAL ACTIONS.—All real actions were at first included under the following divisions: 1. Writs of Right, so-called. 2. Writs in the nature of Writs of Right.

1. Writs of Right dealt not merely with *seizin* or possession of land, but with the *jus*, or right to its possession. They applied only to fee simple titles. The judgment in a trial of the writ of right was absolutely conclusive, so that the courts proceeded with great deliberation in such cases. Collateral proceedings were allowed, such as vouchers to warranty, by reason of which the actions sometimes extended over a great length of time, and even beyond the lifetime of the plaintiff or demandant.

2. Writs in the Nature of Writs of Right were so

called because some of them might be brought by a *life tenant* or a *tenant in tail*. But in many of such actions relief was sought for other things than injuries to the mere right to realty.

As the Anglo-Saxon law had no merely possessory action, the defect was remedied in the reign of Henry II, by providing the *assize of novel disseisin* in 1166, which enabled the party disseized, regardless of the nature of his title, to recover the possession. Which writs were extended and made to lie in favor of the heir of the disseisee and against the heir of the disseisor. All of these writs were long since rendered obsolete by other remedies.

Sec. 1576. Kinds of Mixed Actions.—The principal *mixed* actions are: 1. *Quare Impedit* (wherefore he obstructed), by which, when the right of a party to a benefice was obstructed, he could recover the presentation. 2. *Waste*, by which the owner of land could recover the land and treble damages for the injury committed thereto by the tenant. This action was largely supplanted by the equitable remedy by injunction, which was more efficient.

Sec. 1577. Kinds of Personal Actions.—There was little demand in early times for personal actions, as this was a sort of property that was not as common as at present. In addition the idea of a contract as an *agreement* between the parties was not developed. The fact that the minds of the parties had met in agreement was not of importance to them unless some overt and visible act or ceremony had taken place.

The ancient contracts were *real*, in the sense that they depended upon a fact other than the agreement of the parties. Thus the recipient of a pledge was bound to hand it back, if within due time its owner came to redeem it. This was the pledgee's *duty* rather than his contract obligation. If the pledge was not restored, the owner would reclaim it on the ground that the other unjustly detained what was his, and not because he had promised to give it back upon the performance of the obligation, which had been fulfilled. Personal actions were regarded, therefore, as largely *ex delicto* in character, although this division of actions into *ex contractu* and *ex delicto*, was not made until recent times.

Of the ancient personal actions, five, Debt, Detinue, Covenant, Account and Scire Facias, are said to come under our modern idea of actions *ex contractu*. While personal actions in *tort* or *ex delicto*, were Trespass and Replevin.

Sec. 1578. SAME SUBJECT—DEBT.—In the action of Debt, the idea is that the creditor is being *deforced* of his money, just as the demandant who brings a writ of right is being deforced of his land. The modern action of debt is lineally descended from the *writ of right* for money debt, and is therefore, in its origin, what that always was, a *real action*. Even so late as 1800 the action of debt was rarely employed save to obtain money lent, the price of goods sold, arrears of rent due upon a lease for years, money due from a surety, and a fixed sum due upon a sealed instrument. As the action is independent of what we

designate as a contract, it can be used whenever a fixed sum is due from one man to another.

As later developed the action of debt was employed to recover money in four classes of cases: 1. On records, as upon the judgment of a court of record, a recognizance, a statute merchant, a sheriff's return of *feri feci*, upon which he had not turned over money collected. 2. On a statute prescribing a penalty. 3. On a sealed instrument. 4. On simple contracts and legal liabilities for a sum certain. But in none of these cases was the action of debt sustainable unless the demand was for a *sum certain*, or readily to be made certain by computation. The sum being certain, and for a *debt*, the damages recoverable were nominal, being usually confined to interest on the amount claimed.

The declaration in debt, on a simple contract, must show the fact from which the duty to pay arises, and should state either a legal liability or an express agreement, though not a promise to pay the debt. On sealed instruments, records, the action is supported by the specialty or record, *profert* of which should always be made, or the omission explained. The controlling feature of the action of debt, is, an *omission of duty* on the part of the defendant in not paying a *certain* sum of money, rather than for a breach of a contract to pay.

Sec. 1579. SAME SUBJECT—DETINUE.—The action of *detinue*, originally identical with *debt*, slowly differentiated from it. In the writ or action of debt, the language used was, *debet et detinet* (owes and

detains). It appeared to the legal experts that in some cases the word *debet* ought not to be used, as where a specific chattel had been loaned; and where the original debtor or creditor had died, it was thought that simply *detained* covered the case better than *owes* and *detains*. In order that the proof might not differ from the facts stated in the declaration or pleadings, the action of *detinue* began to appear, so that it soon became a rule that if a particular object was claimed, the pleaded never said *debet*, but only *injuste detinet*. It appearing that the idea of an obligation arising in contract began to be distinguished from a duty to return a specific chattel. So that *debt*, in the sense of owing, as on a contract, was distinguished by a different action from detaining, which latter action became *detinue*.

Detinue is the only remedy by suit at law for the recovery of a specific chattel in specie, except in those cases where *replevin* lies. It could not be maintained to recover realty, and the goods and chattels for which it lies must be distinguished from others by some certain identification. One having the right of property in goods, and also the right of immediate possession, may support this action although he has never had the possession. But if his interest be only in reversion, and he has not the right to immediate possession, he cannot sustain it.

Detinue lies wherever a specific chattel is withheld by the wrongdoer, whether it was originally taken lawfully or unlawfully. If the defendant claim that the goods were pledged to him as security for a loan still

unpaid, or if he assert a lien of any kind on the goods, he must plead the same specially. The declaration should contain a statement of the plaintiff's right to the goods in question, describing them with such certainty as to identify them, and should aver that they are in the defendant's possession, that the defendant acquired such possession by *finding* the said goods, or by their *bailment* to him; that he holds such possession subject to the plaintiff's right to have the same on demand, and that such *demand* has been made and *refused*. Then the value of the goods should be stated.

Sec. 1580. SAME SUBJECT—COVENANT.—Covenant is the action brought for the breach of an agreement expressed in a deed, that is, a writing sealed and delivered. The agreement must be made in this formal way in order to be binding. The limitations upon the action of covenant were soon apparent, it could not be employed for the recovery of a debt, although the debt be attested by a sealed instrument, since a debt could not have its origin in a covenant, but must arise from some transaction as a sale or a loan. Covenant is the only remedy at common law for the recovery of unliquidated damages for the breach of a contract under seal. And at the common law no person could support an action of covenant, or take advantage of any covenant or condition unless he were a party or privy thereto.

The declaration in covenant must state that the contract was under seal, and should usually make profert of such contract or excuse the omission. If perform-

ance of a condition precedent is required, to establish the plaintiff's right of action, such performance must be averred. Only so much of the covenant as is essential to the cause of action should be set forth, and that not in full but according to its *legal effect*. The breach may be alleged in the negative of the words of the covenant, or according to the legal effect. Several breaches may be assigned. Damages being the main object of the suit, they should be laid in a sum sufficiently large to cover the real amount claimed.

Sec. 1581. SAME SUBJECT—ACCOUNT.—In the action of *account* the defendant was called upon to render to the plaintiff justly, and without delay, a certain thing, to-wit: an *account* of his receipts and disbursements during the time he was the plaintiff's bailiff, and, as such officer, receiver of his money. This obligation does not rest upon contract but upon a situation or relation. The court first found whether or not the relation existed and if so it rendered an interlocutory judgment, *quod computet* (let him account). Then auditors were appointed who stated the particulars of the account. This action would lie only where the amount sought to be recovered was uncertain and unliquidated. It has been superseded, save in a very few of the States, by the equitable remedy for an accounting.

Sec. 1582. SAME SUBJECT—THE WRIT OF *SCIRE FACIAS*.—The writ of *scire facias* derives its name from two necessary words in the writ in the Latin form: "*Quod scire facias praeferat John Doe,*

quod sit coram,”—“That you (the sheriff) shall cause the aforesaid John Doe to know that he must be before us, etc.”

Scire facias is an action which is always founded on a record, and the proper writ or action for enforcing compliance with all obligations of record upon which an execution cannot issue, whether by reason of lapse of time, change of parties, or their inherent nature. If the obligation imposed by the record be that of paying a liquidated sum of money, either *debt* or *scire facias* may be used. But if the obligation be of a different nature, *scire facias* is the only action which can be grounded upon the record. In all cases where a new person, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment.

Sec. 1583. SAME SUBJECT—THE FORMED ACTIONS IN TORT—TRESPASS.—Of the formed actions in tort, or *ex delicto*, there were only two: Trespass and Replevin.

According to the old common law a felony could be prosecuted by an appeal, that is, by an accusation in which the accuser must, as a general rule, offer battle. The appeals *de pace et plagis* (of peace broken and blows given) became, or rather were in substance, the action of *trespass*, which is still familiar to the profession. The action of trespass is an attenuated *appeal*. The charge of felony is omitted; no battle is offered, but the basis of the action is a *wrong* done to the plain-

tiff in his body, his goods, or his lands by force and arms and against the king's peace. It was because of the quasi-criminal character of this action that jurisdiction over it was asserted by the King's Bench, which court alone held Pleas of the Crown, or criminal causes. In course of time the cases of trespass grouped themselves into three great divisions. These were:

1. *Trespass de bonis asportatis*, (for goods carried away), where violence was done to the plaintiff's goods.

2. *Trespass de clauso facto*, (for a broken close) or *quare clausum fregit* (wherefore he broke the close) where violence was done to the plaintiff's land or things thereto attached.

3. *Trespass vi et armis*, or trespass by force and arms, where violence was done to the plaintiff's person.

In the action of trespass, the intention of the wrong doer is immaterial. The action cannot be maintained where the wrong complained of was a mere *nonfeasance*; or where the matter affected was intangible, as reputation or health, and so not capable of immediate injury by force; or where the right invaded is incorporeal, as an incorporeal hereditament of any sort; or where the plaintiff's interest is in reversion and not in possession; or where the injury was not immediate but only consequential; or where the act complained of was not the direct act of the defendant, but of his servant in the course of his employment; or, generally, when such act was not unlawful in its inception. In such cases force does not actually exist, and cannot be im-

plied, and the idea of force is an essential element in trespass.

Trespass *de bonis* lies for a forcible injury to the possession of goods affected, and is sustained by one who had at the time of the injury the right to immediate possession as against the trespasser. Possession being implied in one who has the power to assume immediate control over property.

Trespass is also the proper remedy to recover damages for an illegal entry upon, or an immediate injury to, corporeal real property in the possession of the plaintiff. The gist of the action being the injury to the possession of the realty, unless at the time of the injury being committed the plaintiff was actually in possession, he cannot maintain the action. Trespass for an injury to realty can only be supported when the injury is immediate, and was committed with force actual or implied. And though the original entry of a party be lawful, yet a subsequent abuse by him of the authority conferred will make the party a trespasser from the beginning.

Trespass may be supported for injuries inflicted by the defendant's animals, if they were known by him to have proclivities for such acts.

The declaration in trespass should contain a concise statement of the injury complained of, and should always allege that such injury was committed by force and arms, and against the peace (*vi et armis* and *contra pacem*).

Sec. 1584. SAME SUBJECT—REPLEVIN.—

Replevin is an action by which where goods have been illegally distrained, or were charged to have been illegally detained, their owner could at once regain possession of them. This was its peculiar characteristic. But before the plaintiff could get this writ of replevin, he was required to give security that he would prosecute the action against the alleged tortious taker to determine the right to the chattel, and if the right should be determined against him, the plaintiff, to return them to the taker, the defendant in the action. If the sheriff made return to this writ that the defendant had *eloigned* (removed afar off) the chattels, or that they were dead, or the like, then the plaintiff could have a *capias in withernam* (you shall take as a further distress), authorizing the sheriff to seize so many of the defendant's cattle as were equivalent in value as those distrained. In his declaration the plaintiff alleged if he had recovered his chattels, that the defendant had detained (*detinuit*) them, and could recover damages only for the detention; but if he had not recovered his chattels, then he alleged that the defendant detains (*detinet*) them, and he could recover damages not only for the detention, but also for the value of the goods. These forms were called respectively, replevin in the *detinuit*, and in the *detinet*; and if only a part of the goods were recovered the action was in the *detinuit* as to them and in the *detinet* as to the others.

Replevin can be supported only for taking a personal chattel, and not for an injury to things affixed to the

freehold. The plaintiff must at the time of the tortious taking have had either the general property in the goods taken or a special property in them as bailee, pawnee, mortgagee, or the like. Replevin cannot be supported if the plaintiff have not the right of immediate possession, and at the common law it lay only for an unlawful taking. In this action both parties are considered as *actors* or plaintiffs. The defendant, having distrained, is called upon to justify his action. This he does in his plea, which, as it contains the defendant's justification and presents the real question to be tried, that is, the legality of the distress, is essentially a declaration, and the plaintiff's replication a plea; so that, in this action the pleadings are all postponed one step. Instead of justifying the defendant may deny the taking of the chattels as alleged, or may claim property in them. The action is local and the declaration must have certainty of place and description, as well as the number and value of the goods taken. The judgment, when for the plaintiff, is that he recovers his damages and his costs; when for the defendant, at common law, it was *pro retorno habendo* (to have a return) to him of the goods taken in replevin.

Sec. 1585. INADEQUACY OF THE FORMED ACTIONS.—These formed actions were in many ways inadequate. Thus they afforded no remedy for injuries to incorporeal hereditaments; nor for the enforcement of an agreement not under seal; nor for injuries to reputation; nor to health; nor for acts of omission, of negligence, or of deceit; nor for violation of personal rights not in possession. So the remedies for debt not

evidenced by judgment or sealed instruments, or based on a statute, and for the specific recovery of chattels, were miserably inadequate.

Sec. 1586. ENLARGEMENT OF REMEDIES BY STATUTE OF WESTMINSTER II.—To remedy some of the defects of the formed actions, the famous statute of Westminster II (13 Edw. I, Ch. 24), was passed in 1285; authorizing the chancery to frame new writs (*de consimili casu*) in cases similar in principle to the old. Thus writs of *trespass on the case* began to appear. They stated a ground of complaint analogous to, but not quite amounting to a trespass as sued for in the old writs. Such a wrong was called *a trespass on the case* because the writ was very like a writ of trespass, and the facts constituting the cause of action were set out quite fully, so that the plaintiff's case appeared in considerable detail in the writ.

Sec. 1587. ACTIONS FOR TRESPASS ON THE CASE.—Actions on the case lie generally to recover damages for torts not committed with force actual or implied, as was required in the original trespass writs; or for acts committed by force when the thing is intangible; or when the injury is indirect and only consequential; or where the interest in the property affected is only in reversion; or where the wrongful act is done not directly by the defendant but by his servant in the course of his master's business, even without his authority. So the action on the case is the proper form of action for the wrongful and malicious use of legal process, for injuries to health and reputation, for mis-

feasance, for seduction, criminal conversation, and the like. It is also the proper action for fraud, misrepresentation and deceit, independently of written contract.

The declaration in an action on the case ought not to allege the injury to have been committed *vi et armis*, nor should it conclude *contra pacem*. In other points the form of the declaration depends upon the particular circumstances on which the action is based, and consequently there is a greater variety in this than in any other form of action.

Sec. 1588. ASSUMPSIT.—In 1520 it was first decided that under the Statute of Westminster II, allowing new writs in like cases, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case on such promise, thus introducing the whole law of parol guaranty. It was speedily recognized that cases in which the plaintiff gave his time or his labor were as much within the principle of the new action as those on which he parted with his property. The line of thought on which these results were reached seems to have been developed through the following steps: the action on the case lay originally for a *mal* feasance, and without much difficulty it was extended to *mis* feasances, and finally, after a long struggle, it was extended to purely *non* feasances. In this form it was applied to executory contracts not under seal, and thus became established the action of *special assumpsit*. Every such contract required a consideration to support it and render it enforceable.

The next step was taken in 1609 when the courts introduced or admitted the idea of an implied promise, as when the defendant received and accepted goods from the plaintiff under circumstances negating the idea that a gift was intended, he was held to have impliedly promised to pay what they were reasonably worth. This action on an implied promise is *general assumpsit*, and this form of action is also applied to quasi-contracts, which in truth are not contracts at all, but merely certain obligations, largely equitable in their nature, that the law courts enforce under the form of a contract action as the action for the recovery of money paid under a mistake of facts.

The action of *assumpsit* upon parol contracts came in time to be regarded as contract actions, but they had the marks of their *ex delicto* origin strongly impressed upon them. The plaintiff declared, that "the said defendant, not regarding his said promise, but contriving and *fraudulently* intending, *craftily* and *subtly*, to *deceive* and *defraud* the plaintiff, etc." In this action, after verdict, the judgment could not be arrested merely because the defendant had pleaded "not guilty," as there was a deceit alleged.

As developed, the action of *assumpsit* (he undertook) became the characteristic remedy for the recovery of unliquidated damages for the violation of an express contract not under seal, or of a promise implied by law from an executed consideration or from a legal duty. If the action were based upon an express prom-

ise, it was *special assumpsit*, otherwise it was *general assumpsit*.

Assumpsit cannot be based upon an obligation created by a sealed instrument or based upon a record, although the fact that the obligation is *collaterally* secured by such deed or record does not prevent bringing assumpsit upon the main obligation. Nor can assumpsit be brought upon facts excluding the idea of contract, except in those cases coming under quasi-contract.

General assumpsit, or the *Common Counts*, as they are commonly called, cannot be supported by proof of a special executory contract, for the law will not imply a promise where an express promise exists. But if the contract has been fully executed by the plaintiff, he may introduce under the common counts, evidence of the work and labor he has performed, the materials he has furnished, the money he has loaned to the defendant, and the like. So, also, if the special contract is void, or has been abandoned, or if abandonment by the plaintiff is justifiable, *general assumpsit* may be brought.

The *common counts*, so called, were for money paid to the defendant's use; for money had and received by the defendant under circumstances imposing upon him the obligation of paying it over to the plaintiff; for money loaned to the defendant; for interest on such a loan, or on forbearance of money; for balance due from the defendant upon an *account stated*, or agreed upon; for use and occupation of land; for board and lodging; for goods sold and delivered; for goods bargained and sold; for work, labor and materials. In these common

counts, circumstances were also alleged which created the duty or obligation to pay, and the promise to pay was implied from this consideration. Nothing but money could be recovered under the common counts. The declaration in *assumpsit* must invariably disclose the consideration upon which the contract was founded; the contract itself, whether express or implied; and its breach by the defendant. The claim of damages should be laid large enough to cover the real amount of money claimed.

Sec. 1589. **TROVER.**—As the wager of law was a legal method of defense to *detinue* as well as to debt, it became as desirable to substitute a new action for *detinue* as it was to have *assumpsit* in place of *debt*. Accordingly, with the progress of pleading, there was developed the action of *trover*, (from the French verb *trouver*, meaning to find), which was based upon a supposed *finding* by the defendant of the thing demanded, and *converting* it to his use. Gradually the allegation of finding became a pure fiction, and the defendant was not permitted to traverse (deny) it. Trover thus became sustainable against any person who had in his possession, no matter how that possession was acquired, the personal property of another, and who sold or used that property without the consent of the owner, or refused to deliver it upon the owner's demand. The injury lies in the *conversion*, and the action is brought for the recovery of damages to the value of the thing converted, and not to recover possession of the chattels themselves. Satisfaction of the

judgment for the plaintiff transfers the title to the chattel to the defendant, the same as if he had paid the purchase price.

Trover lies only for the conversion of some personal chattel, and not for injuries to real property. It is sustainable only for *specific articles*, but as only damages are demanded the description need not be so specific as in *detinue*.

In order to support the action of *trover* the plaintiff must have had at the time of the *conversion* a general or special property in the chattel converted, and either the actual possession, or the right to immediate possession. Generally, if the property be only special, the possession must have been actually in the plaintiff, but there is an exception to this rule, in the case of one who has also an interest in the goods converted.

Conversion may consist in a wrongful taking, or an illegal assumpsit of ownership, or an illegal use or misuse of the chattel, or its wrongful detention. But a mere omission or non-feasance is not sufficient to support trover. Where the plaintiff is not prepared to prove a wrongful taking, or a wrongful use, or the like, he must make an actual demand upon the defendant before bringing suit, and must prove such actual demand and the defendant's refusal thereof, or such neglect to comply as amounts to a refusal. Such demand and non-compliance are *prima facie* evidence of a conversion, which the defendant may rebut by showing that the chattel was lawfully in his possession, and that he lost it through negligence; or that he was

uncertain as to plaintiff's title and offered to deliver the chattel to the true owner; and the like. There is no conversion unless the act complained of amounts to a denial of the plaintiff's right to possession. If the chattel has been once converted, its restoration to the plaintiff, or a tender of it will not cure the injury, such tender will only mitigate damages. Where it is doubtful whether the evidence will establish a conversion, a *count in case*, for negligence, should be joined.

One joint-tenant or tenant in common or co-parcener cannot support trover against his co-tenant, unless the latter has destroyed or sold the chattel in question, as each has a right to its possession.

For a wrongful taking, trover may be brought concurrently with trespass; but trespass will not lie where the taking was lawful and excusable. The declaration in trover should state that the plaintiff was possessed of the goods in question as of his own property; that they came into the defendant's possession by finding, and that the defendant converted them to his own use, to the damage of the plaintiff in the sum of \$. dollars. The damages should be alleged large enough to cover the value of the goods, and the loss through their detention, judgment being for damages and costs. The allegation of *finding* is not traversable, and its omission is cured by verdict.

Sec. 1590. **EJECTMENT.**—The development of the action of *ejectment* furnishes probably the best illustration of the use of fictions that is to be found in the history of the common law. Originally the termor,

or tenant might have an action in *covenant* against the lessor or his heirs, if he was ejected from the term, and if the lessor was the ejector the lessee might also recover possession, but he could not recover possession from the lessor's feoffee; and against a stranger the termor had no remedy whatever. Such ejectment by a stranger was a disseizin of the lessor, and if the lessor recovered *his* seizin, such recovery did not inure to the benefit of the lessee or termor.

About 1235, a new action—*quare ejecit infra terminum* (wherefore he ejected him during his term)—was given the termor, by which he could recover possession from his lessor's feoffee. And in 1371, the new writ of *ejectione firmæ* (ejectment from the farm) appeared. This new writ was in the nature of a writ of trespass, and lay against *all* ejectors who were strangers to the title, but it gave only damages to the plaintiff. As possession was the main thing the tenant desired to recover, the disappointed suitors began to apply to the court of equity, which was about this time broadening its jurisdiction with great success. And thus under stress of competition, the common law courts awoke to the fact that they could also restore *possession* in ejectment proceedings. This occurred somewhere between 1455 and 1499.

From this time on the action of ejectment begins to take on its modern form, and it is regarded as an action by which the court can restore a termor to the possession of his term if ejected by a stranger or even by his lessor, and also give him damages; and incidentally,

it will try the title of the lessor, for if he had no title the term was void. The question of title could therefore always be raised by the defendant's plea of not guilty. Hence this action permitted the trial of the title, but only when a *real ejectment* occurred, and in its trial of the title it simplified the long, intricate and costly process of a real action.

By reason of being a simplified way of trying title to real property, it offered inducements to the form-enclaved lawyers and courts of that time to adapt it to the trial of title in all cases. But to do so they had to bring themselves nominally within the purview of this action of *ejectment*. They created a lease for the express purpose of trying titles. The claimant out of possession entered on the land with some friend to whom he sealed and delivered a lease for a term of years. This artificial lessee remained upon the land until the adverse party, the actual occupant, came upon the freehold, that is, saw him and went towards him, when he was deemed to have been ejected. The artificial, or specially created lessee, now brings suit against the occupant and serves upon him a writ of *ejectione firmæ*.

This was the *factitious* or artificial stage in the development of the action of ejectment. It worked no injustice so long as the actual occupant was made defendant, or actually knew of the collusive action. But knaves, seeing the possibilities in the case, began to procure a second friendly party to come on and eject the artificial lessee. He was called the *casual ejector*,

and when sued by the artificial lessee made default, and thus the title was adjudged to the plaintiff, although the actual occupant was entirely ignorant of the proceedings. The courts, however, soon remedied this by a rule requiring the actual occupant to have full notice of the proceedings, and giving him opportunity to come in and defend if he so desired.

The action remained in this factitious stage until the time of the Commonwealth (1649-1660), when, on account of the violence sometimes growing out of these artificial entries, Rolle, C.J., advanced the action into what may be called the *fictitious* stage. In this no lease is sealed, no entry or ouster is in fact made, the plaintiff lessee and the casual ejector, are both men of straw. Thus, A, the adverse claimant, delivers to B, the occupant, a declaration in ejectment, in which John Doe and Richard Roe, fictitious persons, are respectively plaintiff and defendant. In this declaration Doe states a fictitious demise of the lands in question to himself by the adverse claimant for a term of years, and complains of an ouster from them by Roe during its continuance. To this is annexed a notice by Roe, to the occupant, informing him of the proceedings, and advising him to apply to the court for permission to defend the action, as he, Roe, has no title and will make no defense. If the occupant does not so comply within a reasonable time, the court will, on proper proof of the service on him of the declaration and notice, give judgment against the casual ejector, Roe, and execution for the possession of the lands to the plaintiff lessee. But

if the occupant apply, as he may be relied on to do, for leave to defend, then he is required to enter into what is called the consent-rule, by which he was compelled to admit a series of fictions, vizable, the *entry*, the *lease* and the *ouster*. Then, and not till then, was he permitted to come in and defend by having his name substituted for that of the casual ejector. Then the cause regularly proceeded to trial.

Ejectment lies for the recovery of the possession of corporeal real property, in which the plaintiff's lessor has the legal interest, and a possessory right not barred by the statute of limitations. The plaintiff must recover upon the strength of his lessor's title; possession gives the defendant a title against every person who cannot show a better or sufficient title. So the plaintiff's lessor must have had the right of possession both at the time of leasing and at the time of bringing the action. If the lease expire during the trial, the successful plaintiff gets judgment with a perpetual stay of execution as to possession, so that he can recover mesne profits and costs. The defendant's possession at the time of leasing must be adverse or illegal. There must be an ouster, but a wrongful detention after lawful entry made will amount to an ouster in law. Where there has been no actual ouster, demand for possession must have been made and refused before bringing the action.

In the fictitious stage of ejectment, no substantial damages could be given for a merely imaginary ouster, so that after the plaintiff had established his title he

was permitted to bring a certain action of trespass, an *action for mesne profits*. In this action the plaintiff complains of his ejection and loss of possession, states the time during which the defendant held the lands and took the profits, and prays judgment for the damages he has thereby sustained. The judgment in the action of ejectment is conclusive evidence of the title at and since the alleged leasing, but not prior thereto, nor is it evidence of the defendants occupancy except from the time of service upon him of the declaration of ejectment. Mesne profits are now usually recoverable in a count joined with the count in ejectment.

Sec. 1591. AT COMMON LAW THE PLEADER MUST NOT MAKE A MISTAKE IN CHOOSING FORM OF ACTION.—At the common law a mistake in the form of the action was fatal to the action. The courts considered form as an essential part of a legal proceeding, and would not allow the parties, even by agreement, to try a question, or to proceed with a cause in the wrong form of action. When the objection to the form is substantial and appears on the face of the pleadings, it may be taken by *demurrer*, by *motion in arrest of judgment*, or by *writ of error*. When it does not so appear, it can only be taken as a ground of *non-suit*. If for such a mistake the plaintiff fail in his action and judgment be given against him for that reason, and not upon the merits, this judgment is no bar to a new action for the same cause. Under the modern practice, such a mistake may be cured by amendment, and has no more serious con-

sequences than delay, expense and mortification to the pleader.

Sec. 1592. EXTRAORDINARY ACTIONS.—

There are a number of extraordinary actions, which were developed from time to time, to meet emergencies, the use of which is permitted only when the ordinary forms of action are insufficient. These are: 1. *Mandamus*. 2. *Procedendo*. 3. *Prohibition*. 4. *Quo Warranto*. 5. *Information*. 6. *Habeas Corpus*. 7. *Certiorari*.

Sec. 1593. SAME SUBJECT—MANDAMUS.

—The writ of *mandamus* (we command), is a mandate issuing, in England, in the king's name from the court of King's Bench, and addressed to any person, corporation, or inferior court of judicature within the king's dominions, requiring to be done some particular *ministerial* act therein specified, which appertains to the duty of the party to whom the writ is addressed, and which the court of King's Bench has previously determined to be consonant to right and justice. This writ may be employed wherever the applicant has the right to have anything done of a ministerial character, and *has no other adequate specific means of compelling its performance*.

Sec. 1594. SAME SUBJECT—PROCEDENDO.

—The writ of *procedendo ad iudicium* (for proceeding to judgment), issues in England, out of the court of Chancery, commanding an inferior court, which improperly delays judgment, to give it, but, of course, without specifying what judgment is to be given; since judg-

ment, if erroneous, must be corrected by means of a writ of error or an appeal. Disobedience to a writ of procedendo may be punished as a contempt.

Sec. 1595. SAME SUBJECT—PROHIBITION.—A writ of prohibition is a high prerogative writ, issuing properly out of the court of King's Bench, directed to the judge and parties to a suit in an inferior court, commanding them to *cease* from the prosecution thereof. It issues upon a suggestion of usurpation of jurisdiction by the lower court. If either the inferior judge or the parties proceeded after such writ of prohibition has issued it was a contempt of the court issuing the writ. When the question of jurisdiction in the lower court is doubtful, it is tried by a feigned contempt, and if it be decided in favor of the lower court, the higher court grants a writ of *consultation*, thereby returning the cause to the lower court to be there proceeded with according to law.

Sec. 1596. SAME SUBJECT—QUO WARRANTO.—The writ of *quo warranto* (by what authority), is in the nature of a writ of right for the king or state against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also against him who holds after cause for forfeiture, or who holds unlawfully after expiration of term.

By virtue of statutes, an *information in the nature of quo warranto*, without a resort to the prerogative writ, may be brought, by leave of court, at the relation of any person desiring to prosecute the same (who is

called the relator), against any person usurping, intruding into or unlawfully holding a franchise or office in any city, borough or town corporate. The relator must have been in some way injured by the act complained of, though not necessarily specially injured. If the defendant be convicted, judgment of ouster may be given against him, and he may also be fined.

Sec. 1597. SAME SUBJECT—INFORMATION.—In England, an *information* on behalf of the Crown, filed in the Exchequer by the king's attorney general, is a method of suit for recovering money or chattels due to the king, or for obtaining satisfaction in damages for any personal wrong committed to the land or other possessions of the Crown. It is grounded merely upon the intimation of the attorney general, who "gives the court to understand and be informed of" the matter in question, whereupon the party informed against is put to his answer, and trial is had as between private subjects.

Sec. 1598. SAME SUBJECT—HABEAS CORPUS.—The writ of *habeas corpus ad subjiciendum* (you shall have the body for submission), is the great common law writ for inquiring into the lawfulness of the detention of any person. The person having in his custody the party restrained of his liberty must forthwith produce him before the court or judge issuing the writ. If, upon inquiry, such judge or court finds such imprisonment or restraint to be lawful, and under sufficient authority, no further inquiry can be made into the guilt or innocence of the accused, and he is re-

manded into custody, to be tried according to the ordinary forms of law; but if it be found that he has been held without lawful authority, he must be released. This writ applies as well where the person detained is a private person, as where he is an officer.

Sec. 1599. SAME SUBJECT—CERTIORARI AND ERROR.—A writ of *certiorari* issues from a superior court to one of inferior jurisdiction, and commands such inferior court to certify to the former the *record* or proceedings in a particular case. Upon reception of the matter so certified, the superior court may proceed with the cause as though it had originated there; or it may simply inspect the record, where the proceeding is a summary one and not according to the common law, and determine whether or not there has been any material irregularity therein, which finding is certified back to the inferior court.

A Writ of Error is a method of procuring a review of a case as to the points of law involved therein, in a superior court, and will be discussed in a later chapter.

CHAPTER III.

OF THE JOINDER AND ELECTION OF ACTIONS.

Sec. 1600. COUNTS IN THE SAME FORM OF ACTION MAY BE JOINED.—For the purpose of lessening the burdens of litigation, certain actions or grounds of complaint are required to be joined, or disposed of in a single suit between the parties. The rule originally was, that counts in the same form of action might be joined, but that those in different forms of actions could not be joined. This rule was grounded in the fact that at that time every proceeding was begun by a separate original writ, and different actions required the corresponding writ, but if two or more grounds of complaint between the same parties fell under the same form of action so as to be set up in separate counts under the same action they not only might be joined, but were required to be joined. To this rule there was a limitation that counts which sounded in contract could not be joined with those sounding in tort. The limitation arose after the action on the case developed to include *assumpsit*, which sounded in contract, and *trover*, or case generally, which founded upon a tort.

Where the same form of action may be adopted for several distinct injuries, the plaintiff may generally proceed for all in one action, though the several rights affected were derived from different titles. But a per-

son cannot, in the same action, join a demand in his *own right*, and a demand in *autre droit* (in another right); nor can he join in the same action, an obligation which is personal, and one which involves the defendant in a representative capacity. However perfect in form each count may be, a misjoinder will be vulnerable to a general demurrer, to a motion in arrest of judgment, and to a writ of error. A demurrer for misjoinder of causes of action must be to the whole declaration. Under the later statutes of jeofails and amendments, a misjoinder may, before verdict, be cured by entering a *nolle prosequi* (unwilling to pursue), upon one or more counts which are objectionable; but after a general verdict for damages, and judgment entered thereon, the judgment would even now have to be arrested, as the court could not say what count or counts the jury assessed the damages.

Sec. 1601. ELECTION OF ACTIONS.—Sometimes the plaintiff has a choice of remedies for the same injury. Thus:

1. Where the title of the plaintiff is doubtful, he should, if possible, choose a remedy requiring proof of possession only; as *trespass*, for example, rather than *ejectment*; and *trespass* and *trover* rather than *assumpsit*.

2. In actions on contracts, the non-joinder of a proper co-plaintiff is ground for non-suit, while in a tort action it is open only to plea in abatement. Again, in contract, the mis-joinder of defendants is a ground for non-suit, and the non-joinder of defendants may

be pleaded in abatement; while in most torts, as in all which are considered joint and several, mis-joinder and non-joinder of defendants is immaterial. So when there is doubt as to who are proper parties, case, or other tort action, should, if possible, be used instead of *assumpsit*.

3. The plaintiff may have some demand which can be brought only in tort, or only in contract, and others which may be brought indifferently. These latter should, if possible, be so declared on as to be joinable with the first.

4. Sometimes to one form of action the defendant may plead a defense which he could not to another. Thus a discharge in bankruptcy, at common law, could be pleaded in bar of *assumpsit* for a contract obligation existing at the time of the discharge, but not in bar of a tort action. So set-off may be pleaded in *assumpsit*, but not in case. In cases of fraud, the statute of limitations may not begin to run until the fraud is discovered, while against the action in *assumpsit* it may begin to run at the time of the transaction. In all of these cases, and many others, the pleader will elect which action is the most advantageous for him to bring.

5. In some cases the plaintiff may choose between a local action and a transitory action. Differences in the ability of the courts, or the prejudices of the jurors, may lead him to prefer one of these to the other.

6. At common law when a tort-feasor died, the cause of action springing from the wrong, died with him. But if the tort is one that can be waived and action be

brought in assumpsit, assumpsit may be brought against the representative of the deceased wrongdoer and satisfaction obtained.

7. Infants, lunatics, and the like, are unable to create contractual obligations against themselves, but they are liable for their torts. Hence, where possible, the action of tort would be preferable to assumpsit.

8. The nature and amount of damages recoverable in different forms of actions, may frequently make one form preferable to another. So in some jurisdictions stringent process exists against defendants in tort actions, which might be an advantage.

9. In debt, judgment by *nil dicet* (he says nothing), or generally, on default, is final; while in assumpsit and covenant it is only interlocutory, and compels delay and additional expense, before execution may be taken out.

Sec. 1602. EFFECT OF ELECTION—RIGHT TO CHANGE FORM OF ACTION.—Where a pleader has elected one form of action, he may nevertheless abandon it, and after duly discontinuing the action, he may resort to another. But where there are two inconsistent remedies, he is bound by his election, and cannot afterwards change his form of action.

CHAPTER IV.

OF THE FULL PROCEEDINGS IN AN ACTION AT LAW.

Sec. 1603. IN GENERAL.—The full proceedings in an action at law from its commencement to its termination involved the following steps in succession: 1. The process. 2. The appearance of the defendant. 3. The pleadings. 4. The trial. 5. The judgment. 6. The execution. 7. Proceedings in error, where such were prosecuted. These will be considered in their order.

Sec. 1604. 1. MEANING OF PROCESS AND KINDS OF PROCESS.—Process is the means used by the judicial authorities to express their orders, and, if need be, to enforce a compliance of the same. The order is seldom made, but is generally implied.

Process is divided into three kinds, which are designated: 1. Original process. 2. The mesne process. 3. The final process.

Original process was the means of instituting the suit and compelling the defendant to come into court.

The mesne process, issued in interlocutory matters, that is, somewhere between the commencement and closing of the suit.

The final process is used in enforcing the court's judgment, as in the issuing of an execution.

Original process, at the early common law, was known as the "original writ."

Sec. 1605. OF THE ORIGINAL WRIT.—The original writ was the King's warrant for the judges to proceed to the trial of the cause. Because the court could not so proceed without the command of the King, the judges had no authority to consider a declaration varying from the original writ, or to allow amendments, or pardon mistakes, or permit a party to change his form of action, or recover more than the amount claimed in his writ. And so purely personal to the king were these original writs, that anciently, upon the demise of the king, all suits pending under writs granted by him were immediately discontinued, and the plaintiff was obliged to sue out a new writ, and begin anew. But as the application for the king's writs became more frequent, and their issue more a matter of course, the issuing of them was more and more entrusted to clerks and other subordinate officials in the chancery, who like most ministerial officers, found it easier to copy precedents than to adapt each writ to its proper purpose. As a result original writs began to fall into hard and fast classes, and were clung to with such persistency by the issuing officers, that the matter had to be remedied by the great statute of Westminster II, providing for the issuing of new writs in like cases.

The form of the original writ was a mandatory letter issuing out of the Chancery, under the great seal of the realm and in the King's name, directed to the sheriff of the county where the injury was alleged to have been committed, containing a summary statement of the cause of complaint, and was in form either

optional or peremptory; it was termed, according to the introductory words of the writ, either a *precipe* (command) or a *si te fecerit securum* (if he shall make you secure). Whenever the plaintiff demanded something certain, which the defendant might himself perform, the writ was properly a *precipe*; where nothing specific was demanded, but only unliquidated damages, to obtain which, the intervention of a court was required, as in writs of trespass or case, there a *si te fecerit securum* was issued. The optional form—the *precipe*—commands the defendant either himself to pay the debt to the plaintiff, or to show at a given time in the King's Court why he does not. The peremptory form, however, calls upon the defendant to appear immediately in court, provided the plaintiff give good security to prosecute his claim. This giving of security is now usually a matter of mere form, and frequently it is not even required as a matter of form. Where the plaintiff is a non-resident of the jurisdiction, however, he is frequently compelled to give security for costs. Both species of writs are *tested* (witnessed) in the King's own name, and issued under the Great Seal of the Realm.

The day upon which the defendant is ordered to appear in court, and on which the sheriff is ordered to bring in the writ and report what he has done in pursuance thereof, is called the *return day* of the writ. The year was divided into four terms in which the courts at Westminster sat for the despatch of business, called Hilary Term, which began January 11th, and ended January 31st, of each year; Easter Term, be-

ginning April 15th, and ending May 8th, of each year; Trinity Term, beginning May 22d, and ending June 12th of each year, and Michelmas Term, beginning November 2d, and ending November 25th of each year. On the first day in each term the court sat to take *essoins* (excuses) for such as did not appear in obedience to the writ, wherefore this is usually called the *Essoin* day of the term.*

A defendant cannot be damaged by the mere suing out against him of the original writ, and no action lies therefore. But if the original were process upon which the defendant could be compelled to come into court, an action would lie whenever the original was sued out without proper and sufficient cause.

The first step to *compel* the defendant's appearance was *judicial*, as contrasted with *original* process. Only the original writ issued from the Chancery, and under the Great Seal of the Realm, all subsequent process, whether original, mesne, or final, was *judicial* process, and issued out of the common law courts into which the original writ was made returnable, under the private seal of that court, and bore *teste* in the name of the Chief Justice of that court.

Sec. 1606. OF THE VARIOUS KINDS OF ORIGINAL PROCESS.—Process at common law

*In the United States jurisdiction is conferred upon the courts by the Constitution and statute laws creating them, and there is no occasion for an original or general writ. We have neither the original writ nor a substitute for it, as our *summons* is not to be confounded with the original writ, though doubtless it was designed to take the place of it.

varied in stringency from the polite *summons*, to the decree of outlawry.

First was the *summons*, a warning to appear in court on the return day of the original writ; this being disobeyed, next came a writ of *attachment*, or *pone*, so called from the words of the writ, "*pone per vadium et salves plagios*" (put by gage and safe pledges), which compelled him to give *gage* (pledge of goods) or *safe pledge* (sureties) that he would appear. If he failed he thereby forfeited his *gage*, and his *safe pledges* were fined. Next there would be sued against the defendant the writ of *distringas* (you shall distrain), or *distress infinito*, under which he was gradually stripped of all his goods. Here process ended in the case of injuries without force; but for injuries with force the obdurate defendant's person was next attached, under a writ of *capias ad respondendum* (you shall take for answering). If the sheriff returns that the defendant *non est inventus* (is not found) in his bailiwick, then a *testatum capias*, issues to the sheriff of the county in which the defendant is supposed to be. The *testatum capias* recites the first writ of *capias*, and adds *testatum est* (it is testified) that the defendant *latitat et discurrit* (lurks and wanders about) in the bailiwick of this second sheriff, wherefore he is commanded to seize the body of the defendant and have him before the court. Where a defendant absconds and the plaintiff wishes to proceed to outlawry against him, if the sheriff cannot find him upon the first writ of *capias*, there issues an *alias* writ of *capias*, and after that a *pluries* writ. If this is inef-

fectual, there issues a writ of *exigent* or *exigi facias* (you shall cause to be exacted) which requires the sheriff to cause the defendant to be proclaimed or exacted, in five county courts, successively, to surrender himself; if he does so the sheriff takes him as in a *capias*; if he does not appear, and is returned *quinto exactus* (the fifth time exacted) he shall then be outlawed by the coroners of the county.

The judgment of outlawry put a man out of the protection of the law, made him incapable of bringing a legal action, and forfeited all his goods and chattels to the king. If the outlaw appeared publicly, he could be arrested on a *capias utlagatam* (you shall take the outlaw) and committed to prison until the outlawry was reversed. It will be noticed that in all this tedious procedure there was no judgment by default, and the whole power of the court was directed to correcting the contumacy of the defendant, rather than to redressing the injury suffered by the plaintiff.

The Court of King's Bench, because in contemplation of law the King sat in it, needed no original writ to give it cognizance of causes arising within the county in which it sat. Its authority entitled it to try causes when the injury alleged was forcible, and therefore akin to crimes. As no original writ was required, it developed process of its own whereby to bring to the notice of the defendant the pendency of a cause against him. This was called a *bill of Middlesex*, or of *Kent*, etc., according to the county in which the court was sitting. This was in form a *capias*, and if the return was *non est*

inventus, there issued a writ of *latitat*, directed to the sheriff of the county wherein the defendant was supposed to be.

It was a privilege of court, that an officer or prisoner therein, might be sued without original writ, that is, the defendant already being in the custody of the court, no original writ was necessary to give the court jurisdiction over him. Out of this fact grew the practice of King's Bench in taking jurisdiction of all civil causes involving personal actions. Thus, a complaint of trespass, *quare clausum fregit*, would be entered in the records of the court, then a bill of Middlesex or other writ would be issued, whereby the defendant was brought into the custody of the court; whereupon the real complaint was made against him, and the complaint of trespass thereafter ignored.

The court of Exchequer extended its jurisdiction in a similar way. The great writ in this court was the *quo minus*. The plaintiff suggests that he is the king's debtor, and that the defendant has done him the wrong complained of, *quo minus sufficiens existit* (by which he is the less able) to pay the King his rent or debt. Upon this writ the defendant may be arrested as upon a *capias*, and once within the custody of the court, he may be proceeded against for any personal cause of action.

Sec. 1607. IN THE UNITED STATES THE PROCESS USED TO INSTITUTE A SUIT IS A SUMMONS.—In the United States, generally, a summons is the form of process used to institute a suit.

It is generally attested by the chief justice, or presiding judge of the court from which it issues, and is returnable to the court from which it issues. It is addressed to the sheriff of the county, is to be returned on a day certain therein named, and in general takes the place of the original writ of the common law.

A *capias ad respondendum*, authorizing the arrest of the defendant's person, is of very limited use in this country as original process. It is allowed in some jurisdictions by express statutory authority in cases of fraud, breach of trust, or other gross wrongdoing.

An attachment is similarly authorized against the property of absconding debtors, non-residents and other classes of persons specifically designated in the statutes providing for this summary process.

Sec. 1608. THE APPEARANCE OF THE DEFENDANT.—The appearance of the defendant is his submission to the jurisdiction of the court. In pleas to the jurisdiction, it must be made by the defendant in person. In all others it may be so made or it may be made by an attorney, or if he has been arrested, his giving bail is an *appearance*. The appearance is usually shown upon the record by the words "and the said A. B. (the defendant) by E. F., his attorney, *venit* (comes), etc." This word, *venit*, is the technical word expressing appearance.

The appearance is either *general* or *special*. If special, the entry must so state, and must show the purpose, as to object to the jurisdiction of the court, to want of service of process, to misnomer, or other formal

defects. A general appearance waives all of these defects, which must be taken advantage of by entering a special appearance only, as for the purpose of objecting to the jurisdiction.

Sec. 1609. THE PLEADINGS—THEIR PURPOSE.—The pleadings are the formal allegations of fact whereon the parties rely to support the claim of injury and the defense thereto. They were made orally in early times, but have for many centuries now been required to be in writing. The facts alleged in the pleadings must be material, that is, they must constitute the minor premise of a syllogism, of which the major premise is purely a proposition of law, the latter not stated because it is presumed to be at all times in the mind of the court. The conclusion of the syllogism is the proposition which the party desires the court to lay down as its judgment.

When the pleadings were oral, as they proceeded they were minuted down by the chief clerk or prothonotary, and, together with the entries from time to time made concerning the cause, constituted the record of the cause. This record, when complete, was preserved as a perpetual, intrinsic and exclusively admissible testimony of all the judicial transactions which it comprised. As it was made by a clerk, one not a party, it was entered as a narrative in the third person. Later the parties, when they began for convenience to write their pleadings, came in and wrote them on the clerk's roll, and they thus to this day are in the third person.

Sec. 1610. THE COURT DIRECTED THE PLEADINGS SO AS TO ARRIVE AT AN ISSUE OF FACT OR LAW AFFIRMED ON THE ONE SIDE AND DENIED ON THE OTHER.—

The court's duty in this connection was to direct the pleadings in such a manner that the parties might as speedily as possible arrive at a proposition, either of fact or law, material to the cause, which was specifically affirmed on one side and denied on the other. When this stage was reached the parties were said to be *at issue* (*ad exitum*, that is, at the end of their pleading), and the proposition evolved was called "the issue." It was according to the nature of the proposition, either an issue of fact, or an issue of law. If the latter, the judges themselves decided the matter; if the former, it was referred to which ever one of the various methods of trial then practiced, as the court thought applicable, or it was, when proper, by mutual agreement of the parties, referred to a trial by jury.

An adjournment of the proceedings from day to day by an order of the court, or from term to term, was called a "continuance," and was minuted on the record. If any interval took place without such an adjournment, duly obtained and entered of record, the break thus occasioned was called a "discontinuance," and the cause was considered as out of court by the interruption, and was not allowed to be proceeded with afterwards.

Sec. 1611. THE FIRST PLEADING IS CALLED THE DECLARATION.—The "dec-

laration" is the first pleading in a cause. It is a formal statement on the part of the plaintiff of the facts constituting his cause of action, or grounds of complaint. The declaration must state the facts constituting the action more fully than does the original writ, but still in strict conformity with the tenor of that instrument. The declaration must state the facts constituting the cause with such precision, clearness and certainty, including certainty of time and place, that the defendant knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises.

The first pleading in an action begun by bill of Middlesex, etc., or by *quo minus* was called a "bill." It was, nevertheless, exactly equivalent to a declaration, differing from it only in some formal words at the commencement and conclusion.

Sec. 1612. CONCLUSION OF THE DECLARATION.—The declaration formerly concluded with the words: "And therefore he brings suit and good proof." The *suit* was the plaintiff's band of followers ready to verify his assertions. Bringing them was called the "production of suit." Later the mere assertion became called by that name. In those days a party's unsupported word was worthless. If no suit is produced, the defendant, upon raising that objection, is excused from further answering. So the defendant might demand examination of the suit, in which case

he abandoned every other form of defense and staked the case upon the testimony of the suit. If compelled to answer the defendant "comes and defends (that is, denied) the wrong and injury when, etc." Having denied the plaintiff's allegations, the defendant must offer to make good his denial "when and where he ought as the court shall consider," whereupon the court awarded the mode of trial.

Sec. 1618. IF THE DECLARATION BE INSUFFICIENT IN LAW THE DEFENDANT MAY DEMUR.—If the matter of the plaintiff's declaration be insufficient in law, then the defendant may *demur*; that is, rest or pause, and takes the court's judgment whether or not sufficient has been alleged to make it needful for him to answer. A demurrer is therefore not a plea, but is rather an excuse for not pleading. The defect apparent upon the face of the declaration may be one of substance, in that no legal cause of action has been stated, or it may be one of form merely, in that the declaration is not framed according to the rules of pleading. A demurrer for the former defect is called a *general demurrer*, and for the latter, a *special demurrer*.

Sec. 1614. THE PLEA OF THE DEFENDANT.—If the defendant does not demur, he must answer the declaration by counter averments of fact. In so doing he is said to *plead*, and his answer so made is called his *plea*. These pleas are either *Dilatory* or *Peremptory*; and dilatory pleas are subdivided into: (i) Pleas to the jurisdiction of the court. (ii) Pleas

in suspension of the action. (iii) Pleas in Abatement of the writ. The peremptory pleas are always in bar of the action.

Sec. 1615. DILATORY PLEAS.—In a plea to the jurisdiction of the court, the defendant excepts to the right of the court to assume jurisdiction of the subject matter of the action against him.

When the plea is to the suspension of the action, it alleges some fact constituting an objection to the proceeding in the suit at that time by the court, and prays that the pleading may be suspended until that objection is removed. Thus non-age of the defendant, when sued upon an obligation of his ancestor, is such an objection.

A plea in abatement of the writ is one which shows some ground for abating or quashing the original writ, and it concludes with a prayer that this may be done. Pleas in abatement are addressed: 1. To the person of the plaintiff; as that he is an alien enemy, or an outlaw, and the like. 2. To the person of the defendant; as that he is a bankrupt, or that she is a married woman, and the like. 3. To the count or declaration; as that it varies from the original writ, or omits to make a joint-contractor party defendant, and the like. 4. To the original writ; as that its parts are repugnant, or that it varies from the record or specialty sued on, or that it misnames the parties, or one of them, or that two parties sued as husband and wife are not in fact such, and the like.

The effect of all pleas in abatement, if successful,

is to defeat the particular action only, but not to destroy or defeat the right of action. Upon removal of the objection, the plaintiff may again sue. Statutes usually require that all dilatory pleas be verified by affidavit, or, at least, that some probable matter be shown to the court to convince it of the truth of the dilatory plea.

Sec. 1616. PEREMPTORY PLEAS.—A peremptory plea, or plea in bar of the action, shows some ground for barring or defeating the alleged cause of action. Its prayer is that the plaintiff may be barred from further pursuing his said action. The plea may either *traverse* (deny) the matter of the declaration, or it may *confess* (admit its allegations of fact) *and avoid it*, by showing other facts which excuse the defendant, and deprive his alleged acts of wrongfulness. Pleas in bar are thus divided into: 1. Pleas by way of confession and avoidance. 2. Pleas by way of traverse.

Sec. 1617. PLEAS BY WAY OF TRAVERSE.—A *traverse* at once brings the cause to an issue, and so concludes with the offer of a mode of proving the denial. This is called “tendering issue,” and the issue so tendered is called an “issue in fact.” A demurrer, as we have already seen, always brings an issue, but it is one of law and not of fact, and the law issues are referred to the court for its decision, there being no choice of modes of determining it, so that the tender of issue in a demurrer is perfectly formal, being made as a matter of course and accepted as a matter of course. The formula of the defendant’s acceptance is called a

"joinder in demurrer." But to the tender of an issue of fact, the plaintiff may demur, either to the sufficiency of the facts alleged, or to the manner of alleging them, or to the mode of trial proposed. If he does accept the issue of fact, an acceptance is expressed by a formula called a "joinder in issue," or a *similiter* (likewise), because the tender of issue ran, "and of this the said C. D. puts himself upon the country, etc.," and the joinder by the other party was, "and the said A. B. does likewise."

Sec. 1618. OTHER PLEADINGS TO ARRIVE AT AN ISSUE.—With either form of joinder above mentioned the parties are "at issue," and the pleadings are at an end. But instead of traversing the declaration, the defendant may plead a *dilatory plea*, or a plea by way of confession and avoidance. In either case, the plaintiff may then demur as before or he may plead by way of traverse, or by confession and avoidance. Such pleading on the plaintiff's part is called the "replication."

After the replication, issue may be joined as before, or the defendant may demur or plead further in any of the ways above described. If he so pleads his plea is called his "rejoinder." And so on the pleadings may continue, the alternate pleadings being, *declaration, plea; replication, rejoinder; sur-rejoinder, rebutter; sur-rebutter*, etc.

If at any stage a demurrer is interposed, it imports no new facts, and in effect admits all allegations of fact well pleaded. New pleadings may bring in new facts and extraneous matters, or deny prior allegations, but

each pleading is taken to admit all prior allegations of fact well pleaded, unless expressly denied in the new pleading.

Sec. 1619. OTHER PLEADINGS OF OCCASIONAL OCCURRENCE.—There are certain pleas and incidents of only occasional occurrence, that diversify the ordinary course of pleadings.

Sometimes a matter of defense arises after a continuance and before the time to which the cause was continued. This the defendant pleads in a plea *puis darreign continuance* (after the last continuance). Such plea is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. It may be either in bar, or in abatement, and is followed with a traverse or plea as other pleas.

In most real actions the tenant is allowed to *demand* a view of the land which the demandant claims in order to see if it is the land which the tenant claims and occupies. This being done the demandant (plaintiff) sues out a writ instructing the sheriff to cause the tenant to have a view of the land. The demandant goes along and points out the land with its metes and bounds. On the sheriff's return of the writ, the demandant is required to plead *de novo* (*anew*), and the pleadings proceed to issue.

When lands have been warranted to a tenant, and another person brings a real action against him in respect thereof, he, by a *voucher to warranty*, calls the warrantor into court to defend the title for him. When the warrantor does not voluntarily appear, there issues

a summons *ad warrantizandum*. When he appears, voluntarily or otherwise, and offers to warrant the land to the tenant, it is called "entering into a warranty," after which the warrantor is considered as the tenant in the action, and the demandant then pleads *de novo*, declaring or counting against the warrantor, or *voucher*, as he is now called.

Where either party alleges any deed, he is generally obliged to make *profert* (proffer) of it, after which the other party may *crave oyer* (ask to hear it). Upon this demand being made the profferer usually read the deed aloud. Later, his attorney merely furnished a copy. Oyer is demandable in all classes of action, but only where *profert* is made, and only in that term of court at which *profert* is made. Whatever appears in the deed when so read is considered as having been originally pleaded by the profferer, and is repugnant to anything else in his pleading, the other party's proper course is to demur, and to object by plea.

Anciently when a party found himself unprepared to respond immediately to his adversary's pleading, he prayed the court to grant him further time. Such delay, when granted, was called an "imparlance," because it was supposed that in this time the parties might *imparl* (talk together) and come to some amicable settlement of their controversy.

Usually the opposite party had the right to oppose the prayer for any of the above described incidents. And this he might do by demurrer if the objection appeared

on the face of the pleading objected to; otherwise, it was done by counter-plea.

Sec. 1620. OF THE PAPER-BOOK, OR DEMURRER-BOOK.—The cause being at issue, the next step is to make a transcript of the whole pleadings that have been filed or delivered between the parties. This transcript, when the issue joined is an issue in law, is called the “demurrer-book;” when an issue of fact, the transcript in some cases is called “the issue,” in others the “paper-book.” Besides the pleadings, it contains entries of appearances, continuances, etc. When made up it is delivered to the defendant’s attorney, who, if it contains what he admits to be a correct transcript, returns it unaltered; but if it varies from the pleadings that were filed or delivered, he applies to the court to have it set right.

The party finding that he has made any mistake, or unwise move, should apply before judgment for leave to amend. This, until judgment is signed, is granted of course, but upon proper and reasonable terms, including the payment of the costs of application, and sometimes the whole costs of suit up to that time. Statutes in modern times are liberal in their directions concerning amendments and are liberally administered by the courts, but always with due regard to the rights of the opposite party.

The pleadings and issue being adjusted and transcribed upon the demurrer-book, issue, or paper-book, the record is next drawn up on parchment roll. This proceeding is called entering the issue. And the roll

on which the entry has been made is called the "issue roll." It contains an entry of the term in which the transcript book is entitled, the warrant of attorney, the pleadings, continuances, etc., as in the paper-book, and when completed is filed in the proper office of the court.

When, upon a demurrer, the issue has been arrived at and the proper entries made of record, the next step is to "move for a *concilium*," that is, move to have a day appointed on which the court will have the counsel argue the demurrer. Such day being set, the cause is "entered for argument," which is had *viva voce*.

Sec. 1621. OF THE VARIOUS KINDS OF TRIAL.—The proceedings by which the issue of fact arrived at in the pleadings is examined, and the decision arrived at, is called "the trial." Various methods of trial were anciently in use; these were designated as follows: 1. Trial by witnesses. 2. The trial by oath of the party, with or without fellow-swearers (compurgators). 3. The trial by battle or ordeal, either of fire or water, or combat.* 4. Trial by the record, as where

*Trial by Ordeal was the most ancient species of trial, it was also called *judicium Dei* (the judgment of God) and was based generally on the notion that God would interfere miraculously to vindicate the guiltless. The fire ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron; or else by walking barefoot and blindfold over nine red-hot plow shares, laid lengthwise at unequal distances. If the party escaped being hurt, he was adjudged innocent; otherwise he was condemned as guilty. Trial by ordeal, whether of fire, hot water, cold water or wager of battle, was abolished as the people

the issue was *nul tiel record*, the court could award a trial by "inspection and examination of the record" in question, which is the only proper mode of trial of such a question. The party alleging the existence of a record is bound to produce it in court at the day set.* 5. Trial by jury. The trial by jury was introduced into England by the Normans, and came to supersede all other methods of trial in course of time.

Sec. 1622. THE TRIAL BY JURY.—In the early history of trial by jury, the jurors were witnesses acquainted with some or all of the facts in controversy between the parties litigant; they came together and compared their respective impressions of the facts and arrived at a collective judgment as to the facts in issue. Sometimes not being sufficiently advised as to what constituted the facts, it became necessary to examine witnesses, and thus the jury system gradually came to what it is today,—a body of men appointed to hear the evidence and determine the true facts and, under the instruction of the court, the legal effect thereof.

When the parties have actually "put themselves upon the country," that is, in legal terminology, have asked for a trial by jury, a jury trial is awarded and the writ of *venire facias* (you shall cause to come) issues, addressed to the sheriff of the county of the *venue*,—that

became sufficiently civilized to recognize the ridiculousness of such a procedure as a test of guilt or innocence.

*There were also a few miscellaneous methods of proving particular facts, as by the certificate of a bishop, inspection of a party to determine infamy, etc.

is, the county where the facts are alleged to have occurred, and commanding him to summon a jury from the body of his county.

The *venire facias* directs the sheriff to have the jury before the superior court at Westminster at the time stated in the writ, *nisi prius* (unless before) the justices of the superior court came into his county to try the cause there upon their semi-annual circuit (which was always done), in which case he should have the jury in the *assize* town of his own county, where the justices in Eyre came. When the trial is to be so had, with the *venire facias* was sued out another writ, called in the King's Bench, the *distringas*, and in the Common Bench, the *habeas corpus*. The next step was to make up at the proper offices the record of *nisi prius*, which is a transcription from the issue roll, and contains a copy of the pleadings and the issue. The *nisi prius* record is then delivered to the judges of *assize* and *nisi prius* and serves for their guidance as to the issue to be tried on the circuit.

As a rule the trial by jury was usually held at *nisi prius*, yet in causes of great significance and difficulty the inquest by jury was allowed to be taken before the four judges in the superior court, before whom the pleadings took place, as in the ancient practice. The proceeding is then technically said to be a "trial at bar," as distinguished from a trial at *nisi prius*.

Sec. 1623. SUBMITTING THE FACTS TO THE JURY.—At the trial by jury, the proceedings are directed by the judge or judges; it being the func-

tion of the judge to pass on the admissibility of any evidence that may be offered by one party and objected to by the other as irrelevant, or incompetent, the judge is also to instruct the jury with regard to the duties it is to perform. After hearing the evidence, the addresses of counsel, and the charge of the judge, and his instructions in regard to the construction of any instrument in writing that may have been introduced in evidence, the jury retires and having deliberated on the case announce its *verdict*, which the law requires to be unanimously given. The verdict is usually in general terms as "for the defendant," "for the plaintiff," and in the latter case finding at the same time, where damages are claimed, the amount to which the plaintiff is entitled.

The rules governing the jury in the arriving at its verdict are, briefly, these: 1. To take no matter into consideration but the question at issue. 2. To give its verdict for the party who, upon the proof, appears to have succeeded in establishing his side of the issue. 3. Consider the burden of proof to be upon him who has the affirmative of the issue; and if he does sustain his contention, in civil cases by a preponderance of the evidence, and in criminal cases, by proof beyond a reasonable doubt, the verdict should be given to him who has the negative.

Sec. 1624. OF A VARIANCE.—A disagreement upon a material point between the allegations and the proof at trial, is called a "variance," and is fatal to the party on whom rested the burden of sustaining that

particular allegation. It is sufficient, however, that the issue in the pleadings be substantially proved.

Sec. 1625. **ENTERING THE VERDICT OF THE JURY.**—The verdict, when given, is formally drawn up and entered on the back of the record of *nisi prius*. Such entry is called the *postea*, from the language, “afterwards came the jury, etc.”

Sec. 1626. **OF EXCEPTIONS, AND THE BILL OF EXCEPTIONS.**—If either party is dissatisfied with the ruling of the judge on points of law, as the competency of witnesses, or the admissibility of testimony, and wishing to have such ruling reviewed by a superior court, he may, in the superior court from which the judge came, move for a “new trial,” but as the trial judge is a member of that court, he may desire to have it reviewed in another court, in which case he must get his objection into the record. This he does by objecting, or, as the phrase is, excepting to the ruling of the judge at the time it is made. Within a convenient time thereafter, which time is fixed by the rules of the court, he tenders to the judge a “bill of exceptions,” that is, a statement in writing, of the rulings made by the judge, and his objections thereto; to which statement, if truly made, the judge is bound to set his seal in confirmation of its accuracy. The cause, after exception taken, proceeds as though there had been no objection made, but later, when the whole record is taken to the appellate court by “writ of error,” the bill of exceptions is treated as part of the record, and the points of law raised in it are decided in the

appellate court, which may be the same as that of the lower court or it may be according to the contention of the party prosecuting the writ of error.

Sec. 1627. A PARTY MAY DEMUR TO THE EVIDENCE.—A party disputing the legal effect of any evidence offered, may “demur to the evidence.” By so doing he says in effect that admitting all the properly received evidence offered by the other side to be true, it is, nevertheless, insufficient to sustain the opposing side of the issue, and because it is thus insufficient, he does not desire to introduce any evidence. Upon joinder in this demurrer, the jury is generally discharged from giving any verdict; and the demurrer, being entered of record, is afterwards argued and decided in court *in banc*, and the judgment there given upon it may be ultimately reviewed before a court of error, the same as if it had been tried on the facts and bill of exception taken.

A more convenient course for determining the legal effect of the evidence, is to obtain from the jury a “special verdict;” that is, the jury may be asked, instead of finding simply the affirmative or negative of the issue, to find a special verdict as to all the facts of the case as disclosed upon the evidence before them. The entry of the verdict, *postea*, in practice is drawn up by professional hands, and the jury merely declares its opinion as to any facts remaining in contention, and the special verdict is drawn up and settled under the correction of the judge, by the counsel of both sides, according to the findings of the jury so far as deliv-

ered, and as to other facts according to what it is agreed they ought to find from the evidence submitted. This special verdict along with the whole proceedings of the trial is entered of record, and argued before the court *in banc*, and there decided as in case of a demurrer to the evidence.

The dissatisfied party may afterwards resort to a court of error. They cannot be compelled to give a special verdict. A special verdict, when given differs from a demurrer to the evidence, in that the former ascertains the facts proved, the latter recites all evidence adduced; in favor of the special verdict no inferences as to matters of fact are allowable, whilst in the case of the demurrer, the court must draw from the evidence demurred to, all inferences that a jury might reasonably draw.

When it is not desired to make out a writ of error, but merely to obtain the decision of the court *in banc*, the shorter and cheaper course is to take a general verdict, subject, as the phrase goes, to "a special case," that is, to a written statement of all the facts of the case, drawn up for the opinion of the court *in banc*, by the counsel and attorneys on either side, under the correction of the judge at *nisi prius*, according to the principal of a special verdict.

Such special case is not entered on the record. A general verdict subject to a special case, is sometimes called "a case agreed." The "case agreed" may occur at any time after suit is instituted; the "special verdict" only after issue joined. Like the special verdict the

case agreed admits of no inferences of fact, but is strictly construed.

Sec. 1628. OF THE JUDGMENT.—In case of trial at *Nisi Prius*, the return day of the last jury always falls upon a day in term subsequent to the trial at *nisi prius*, and forms the next continuance of the cause. On this day, or in case of trial at bar, immediately after such trial, *judgment* is ready to be rendered, but in practice a period of four days elapses before judgment can be actually obtained. During these four days the unsuccessful party, in order to avoid the effect of the verdict, may: 1. Move the court to grant a “new trial.” 2. Move the court to “arrest the judgment.” 3. Move the court to give judgment “*non obstante veredicto*” (despite the verdict), if he was the plaintiff. 4. Move the court to “award a replader.” 5. Move the court to “award a *venire facias de novo*.”

Sec. 1629. HOW A MOTION FOR A NEW TRIAL IS SUPPORTED.—A motion for a new trial may be supported on one or more of these grounds: 1. The judge’s misdirection to the jury. 2. The erroneous admission or rejection of evidence. 3. The verdict of the jury being contrary to the evidence. 4. The verdict based on evidence insufficient in law. 5. The verdict clearly contrary to the weight of evidence. 6. The discovery of new and material evidence, subsequent to the trial, which the party could not have obtained before the trial by the exercise of due diligence. 7. Excessive, or insufficient damages. 8. Misconduct of the jury, in any respect.

In case any of the above grounds are properly shown to have existed, on motion duly made, it is the duty of the court, in the exercise of its discretion, and with a regard to all the circumstances in the case, to grant a new trial. If this is done, a new jury process subsequently issues, and the cause comes on to be tried *de novo*.

Sec. 1680. GROUNDS UPON WHICH A MOTION IN ARREST OF JUDGMENT MAY BE MADE.—A motion in arrest of judgment may be made upon the ground of any error, apparent on the face of the record. But such error must be substantial. Merely formal errors may be corrected by amendment of the record, such corrections being authorized by the statutes of *jeofails* and amendments.

Sec. 1681. WHEN THE MOTION FOR VERDICT *NON OBSTANTE* SHOULD BE MADE.—A motion for judgment *non obstante veredicto* is made where, after a pleading by the defendant in confession and avoidance, and issue joined thereof, and verdict found for defendant, the plaintiff on examining the whole record conceives that such plea in avoidance was “bad in substance” and should have been demurred to. The verdict merely finds the plea true, and if it were bad in substance, of course it cannot support a judgment, while the defendant by his confession of the material allegations of the plaintiff, has, the plaintiff conceives, really acknowledged his right to recover. It is expedient for the plaintiff to so move even though the verdict be in his own favor, if it seems, in such a case as

above described that the judgment taken upon the verdict would be erroneous, for then the only safe course would be to take it as by confession.

Sec. 1682. WHEN A MOTION FOR A REPLEADER SHOULD BE MADE.—A motion for a repleader is made where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was immaterial, and that the defect in the pleadings cannot be cured by a judgment *non obstante veredicto* as above described. A motion for a judgment *non obstante* could be made only by the plaintiff, but the motion for a repleader could be made by either party.

A motion for judgment *non obstante veredicto* is always upon the merits of the action, while a motion for repleader is upon a formal defect in the pleadings.

Sec. 1683. WHEN A *VENIRE FACIAS DE NOVO* WILL BE AWARDED.—A *venire facias de novo* will be awarded when, by reason of some irregularity or defect in the proceedings on the first *venire*, or on the trial, the proper effect of that writ has been frustrated, or the verdict has become void in law, as where the jury has been improperly chosen, or has given an uncertain or ambiguous or defective verdict. Hence the objection raised by a motion for a *venire facias de novo* is to the practical course of the proceedings rather than on the merits.

Sec. 1684. OF THE FORM OF THE JUDGMENT.—When the issues have been decided in favor of one or the other of the litigants, and all motions

after trial have been disposed of, nothing further remains than to award the judicial consequences which the law attaches to such decision, which award is called the *judgment*.

When the judgment is for the plaintiff upon an issue in law arising upon a dilatory plea, the judgment is that the defendant *respondeat ouster* (answer over). Upon all other issues in law, and upon all issues of fact the judgment is that the plaintiff *quod recuperet* (do recover). A judgment *quod recuperet* is of two kinds: interlocutory, and final. The final judgment is rendered where the trial, in its course, has shown the amount of damages which the plaintiff ought to recover, or has shown his title to the property, where that is the issue. The interlocutory judgment is given where he sues for damages, and the trial, as in the case of an issue in law, does not disclose the amount of damages to which he is entitled, such amount is then to be ascertained by a subsequent inquest.

When judgment is for the defendant upon an issue arising upon a dilatory plea in abatement, it is that the writ be quashed (*quod breve cassetur*); if in suspension only, it is that "the pleading remain without day until, etc." If the issue arise upon a declaration or peremptory plea, the judgment generally is that the plaintiff take nothing by his writ (*nil capiat per breve*).

In judgments by default, confession, etc., when the defendant appears, but does not plead or follow up his plea until issue joined, judgment of *nil dicit* (he says nothing) is given against him; if instead of a plea his

attorney says he is not informed of any answer to be given, judgment of *non sum informatus* (I am not informed) is given against him. If before pleading he confess the action, or after pleading he confesses the action and withdraws his plea, the judgment against him is called "judgment by confession, etc." If the plaintiff fail to make the next move in pleading when he ought, judgment of *non pros.* (*non prosequitur*—he does not pursue) is given against him. If he says he will not further pursue, or that he withdraws his suit, or prays that his writ or bill may be quashed that he may sue out a better one, the judgment against him is *nolle prosequi*, *retraxit*, or *cassetur breve*, respectively.

Judgment of nonsuit goes against the plaintiff upon a trial by jury, if, upon being demanded at the instance of the defendant to be present when the jury gives its verdict, he fails to do so. So judgment, as in the case of non-suit, is given where the plaintiff neglects to bring the cause on to be tried in due time.

The proceedings, including the judgment, subsequent to the award of venire are entered with the continuances, etc., on the issue roll, and in continuation thereof. This is thenceforth called the "judgment roll," and is deposited and filed of record in the treasury of the court.

Sec. 1635. OF THE WRIT OF EXECUTION.
—For the purpose of putting in force the judgment, the successful party sues out such writ of "execution" as he conceives himself entitled to (taking upon him-

self all risk of error therein), the writ so issued is addressed to the sheriff and commands him to give the plaintiff possession of the lands, if that is the case, or to enforce the delivery of the chattels in question, or to levy the debt and damages and costs recovered by plaintiff, or to levy for the defendant his costs.

Sec. 1636. OF THE WRIT OF ERROR.—A writ of error is an original writ directed to the judges of the court in which judgment was given, and commanding them in some cases, themselves to examine the record, and, in others, to send it to a court of appellate jurisdiction, there to be examined in order that some error alleged to be therein may be corrected. The first form is a writ of error *coram nobis* or *vobis*. Errors of fact are the only ones corrected by this form, and these errors of fact are technical errors in the proceedings, such as allowing an infant to appear by attorney instead of by guardian; allowing a *feme covert* to be sued without having her husband joined, etc.

The second form of writs of error does not direct the judges to re-examine the record, but to send it to the appellate court. Judges are, in contemplation of law, bound, before giving judgment, to examine the whole record, and then to adjudge either for the plaintiff or defendant according as the legal right may on the whole appear, without regard to the issue in law or fact that may have been raised and decided between the parties. Error in so doing, is thus apparent upon the face of the record, and it is such error that is corrected in the appellate court.

CHAPTER V.

OF THE RULES OF PLEADING.

Sec. 1637. THE OBJECTS OF PLEADING.—

In order that the business before the courts may be performed with convenience and dispatch it is necessary that the point or points material to the rights in controversy between the parties be arrived at as precisely as possible by the litigants before the matter is presented to the court for decision. The court maintained at public expense cannot with propriety be called upon by the parties to do this work except in so far as from the nature of things it is impossible that they should do it for themselves.

The early judges thought that it was sufficient for the attainment of substantial justice if the parties were permitted to stake their claims upon a single issue, it being left to them to determine what this issue should be. Singleness of issue is also to a considerable extent necessary in jury trials, to avoid confusing the frequently untrained minds of the jurors. The same considerations also requires that the issue be clear and unambiguous, and also that it be *certain*. It being said by Mr. Stephen, that the chief objects of pleading are "that the parties be brought to issue, and that the issue so produced be *material, single, and certain* in its quality. Also the avoidance of *obscurity, and confusion*—

of *prolixity* and *delay*.”* The rules of pleading are those developed by the experience of the pleaders for the sake of achieving these objects. These rules have been thus classified by Mr. Stephen:

I. Of rules which tend simply to the production of an issue.

II. Of rules which tend to secure the materiality of an issue.

III. Of rules which tend to produce singleness or unity in the issue.

IV. Of rules which tend to produce certainty or particularity in the issue.

V. Of rules which tend to prevent obscurity and confusion in pleading.

VI. Of rules which tend to prevent prolixity and delay in pleading.

VII. Of certain miscellaneous rules.†

Sec. 1688. **RULE I—THE PRODUCTION OF AN ISSUE.**—*After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.*

The exceptions to this rule are: where a *dilatory* plea is interposed; pleadings in *estoppel*; and where a *new assignment* is necessary.

The fact that the party *must demur* or *plead*, gives the rule two branches for consideration: the demurrer, and the *pleadings*.

*Stephen on Pleading 135.

†Stephen on Pleading 136.

Sec. 1639. OF DEMURRERS, THEIR NATURE AND PROPERTIES.—It is never proper to demur except for *defects apparent upon the face* of the pleading demurred to, and it is never improper, though sometimes unwise, to demur for such a defect.

Demurrers in *nature* and *form* are of two classes: *general* and *special*. A *general* demurrer excepts in *general* terms to the sufficiency of the pleading demurred to, but is proper only when the insufficiency is on a matter of substance. A *special* demurrer is necessary where the objection turns on a matter of form only, and it must show the particular ground of objection. It is to be noted, however, that under a special demurrer, the party may on argument not only take advantage of the particular faults which his demurrer specifies, but also all such objections in substance as do not require, under the statutes to be particularly set down. The safer course is therefore to demur specially, but a special demurrer is open to the objection that it compels the party demurring to particularize the defects, and thus inform the other party of them, earlier than he otherwise would have to do.

Sec. 1640. EFFECT OF A DEMURRER.—The first effect of a demurrer is that it admits all such matters of *fact* as are *sufficiently* pleaded in the pleading demurred to, that is, it is an admission, for the purposes of the demurrer, that the facts alleged are true. In considering the demurrer the court will consider the whole record and give judgment to the party who, on the whole, appears to be lawfully entitled to it. The

exceptions to this are: 1. That if the plaintiff demur to the plea in abatement, and the court decide against the plea, the judgment is *respondeat ouster*, without regard to any defect in the declaration. 2. Though upon the whole record the right may appear to be with the plaintiff, yet the court will not adjudge in favor of such right unless the plaintiff have himself put his action and right upon that ground.

The court in examining the whole record to determine the right, will only consider matters of substance, and will overlook defects of mere form, unless raised upon special demurrer.

Sec. 1641. OF THE EFFECT OF PLEADING OVER WITHOUT DEMURRER.—The effects of pleading over without demurrer, where demurrer might be made, are that: 1. Faults in the pleading are in some cases *aided*, that is cured, by pleading over, and with respect to all objections of *form* the rule is, “if a man pleads over he shall never take advantage of any slip committed in the pleading of the other side which he could not take advantage of upon a *general* demurrer.”* 2. Faults in the pleading are, in some cases, aided by verdict. “Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts as defectively or imperfectly stated or omitted and with-

*2 Salk. 519.

out which it is not to be presumed either that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict."* But if a necessary allegation be altogether omitted in the pleading, or if the party by whom it is alleged, and such matter is so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid or cure it. 8. At certain stages of the cause, all objections of form are cured by the different statutes of *jeofails* and *amendments*. Neither after verdict, nor after judgment by confession, *nil dicit*, or *non sum informatus*, can the judgment be arrested or reversed for any objection of the mere form.

Sec. 1642. OF THE PLEADER'S ELECTION TO DEMUR OR PLEAD.—Even though ground for demurrer exists, it is not always advisable to demur. The statutes of *jeofails* and amendments are so liberal that when the defect is one of form merely it will be remedied thereby, and the only effect of demurrer would be to delay the proceedings and give the opposite party an opportunity to improve his pleadings; or if the defect was one not curable by the statutes, it may be better to wait and take advantage of it by motion in arrest of judgment, or for dismissal of the cause, etc. Sometimes, also, by passing an objection and pleading over instead of demurring, one obtains the advantage of contesting with his adversary first upon an issue of fact,

*1 Saund. 288, N. (1).

and afterwards, if the verdict goes against him, of moving in arrest of judgment, or taking out a writ of error, which course is only open when the defect is one which is not cured by verdict. So costs are not allowed when the judgment is arrested, nor when it is reversed upon writ of error, but on demurrer the successful party obtains his costs.

Sec. 1643. PLEADINGS IN GENERAL.—Under this head, Mr. Stephen examines: 1. The nature and properties of *traverses*. 2. The nature and properties of pleading in *confession* and *avoidance*. 3. The nature and properties of *pleadings in general*, without reference to their quality, as being by way of traverse, or confession and avoidance.*

Sec. 1644. OF THE NATURE AND PROPERTIES OF TRAVERSES.—Of the various kinds of traverses, the most ordinary kind is called the *common* traverse. It consists of a *tender of issue*, that is, of a denial accompanied by a formal offer of the point denied for decision, and the denial that it makes is by way of *express contradiction in terms of the allegation traversed*. These are generally expressed in the negative, but if opposed to a precedent negative allegation, then, of course, it is in the affirmative.

There is another class of traverses of frequent occurrence, known as *general issues*, so called because the issue that one of them tenders involves the whole declaration or the principal part of it, and usually the

*Stephen on Pleading 153.

contradiction is *not in terms of the allegation traversed*, but in a more *general* form of expression. Thus, in *debt* upon *specialty*, the general issue is called the plea of *non est factum*; upon simple contract, the plea is *nil debet*. In *covenant* it is *non est factum*. In *detinue* it is *non detinet*. In *trespass*, and *trespass on the case* in *general*, it is *not guilty*. In *trespass on the case* on promises (*assumpsit*) it is *non assumpsit*. In *replevin* it is *non cepit*. The great practical advantage of the general issue is that it brings to issue at the earliest possible stage in the cause, and in many cases it puts the plaintiff to the proof of every substantial part of his cause of action, that is, the general issue usually admits nothing, and denies all.

Sec. 1645. SAME SUBJECT—OF THE EFFECT OF GENERAL ISSUES.—The general issue of *non est factum* denies that the deed mentioned in the declaration is the deed of the defendant. Under this traverse, the defendant, at the trial, may contend either that he never executed such deed as alleged, or that the alleged deed is absolutely void in law. But matters which make it voidable only, as infancy and duress, must be specially pleaded.

Nil debet, as a traverse, is much broader than *non est factum*. It is adapted to any kind of defense that denies an existing debt. This includes not only a denial of the sale and delivery of goods, etc., but also *release*, *satisfaction*, *arbitrament*, etc., and in fact almost all matters of defense to an action of debt.

Non detinet says that the defendant “does not detain

the said goods," etc., the said goods being specified as the goods "of the plaintiff." Under it, therefore, the defendant denies either the detention charged, or else the plaintiff's property in the goods in question.

In the action of trespass upon the person *not guilty* amounts only to a denial of the trespass alleged, and does not permit any excuse of the trespass. Such matter in excuse must be specially pleaded. In trespass *quare clausum fregit*, it may deny the breaking and entering, or the plaintiff's possession. In trespass *de bonis*, it denies the taking and also the ownership or possession of the goods.

So far the effects of the general issue is consistent with the form and principle of these pleas, but in the general issues in trespass on the case in promises (*assumpsit*), and trespass on the case in general, the effect of the general issue is much broader. It will be remembered that the action of *assumpsit* first grew up in its general form, where the promise is implied; here where the promise might be shown by implication, it was considered only fair that the defense be treated with equal liberality, hence the defendant, under his plea of *non-assumpsit*, was at liberty to show any circumstance tending to disprove the debt or liability alleged. By gradual relaxation, this liberality was extended to *special assumpsit* also, so that under *non-assumpsit* the defendant is permitted to show any matter of defense except *tender, bankruptcy, statute of limitations, discharge under the insolvency acts, set off, and defenses under the court of conscience acts*. But set off may be shown if notice

of it be given with the plea. A similar relaxation exists with regard to the plea of *not guilty*, in the case of trespass on the case in general. But the statute of limitations, the truth of the statement alleged to be libellous, and the retaking upon fresh pursuit in an action for escape, must all be specially pleaded.

But even in the case of matters in confession and avoidance that may be shown under the general issue, the defendant may, if he so desires, plead them specially. The chief advantage of pleading specially is that it compels the plaintiff to reply, in doing which he is confined to a single answer. This often puts him to a great disadvantage, for he may have several answers to the defendant's case, and where the general issue is pleaded, may avail himself of them all.

The general issue of *non cepit* applies where the defendant has not in fact taken the goods in question, or where he did not take them or have them in the place alleged; but singularly enough, it does not deny the plaintiff's property in the goods.

Sec. 1646. OF SPECIAL TRAVERSES.—A special traverse is a pleading which sets out with a detail of circumstances inconsistent with those stated in the preceding pleading to which it purports to be an answer, and then directly denies some fact stated in the preceding pleading and concludes with a verification. The detail of inconsistent circumstances with which it commences, is called the *inducement* to the traverse; the denial is called, from its introductory words, the *absque hoc* (without this).

This indirect form of denial might be advisable in any of four classes of circumstances, as follows:

1. The case might be one in which some principle or rule of law was opposed to a direct denial.

2. Some fact, ordinarily immaterial, but in the present case material, might be falsely pleaded by the adversary, and the purpose of the defense would require the materiality of that fact to be made apparent on the face of the pleading.

3. It might be desirable in the particular case to separate questions of law from those of fact.

4. The party pleading the special traverse may desire to get by so doing the right to open and conclude the cause.

An example under the first class of circumstances may be as follows: Lessor's heir sues the lessee for non-payment of rent, alleging in lessor a title in fee simple. A rule of law prohibits the lessee from denying the lessor's title, but does not compel him to admit the precise title alleged, so that a special pleading may raise the issue that lessor did not have a title in fee but only a life estate.

Under the second class it may be observed, that while the time and place of facts constituting transitory causes of action are immaterial, yet if the question involved is one of authority, as of a sheriff, time and place become material incidents.

Under the third class, in an action of waste, the acts of devastation may have been committed by rebels in arms. And the defendant wishes to raise the question

of his legal liability for such acts, and therefore pleads the fact of devastation wrought by rebels in arms, and under the *absque hoc* denies his guilt. This compels plaintiff to demur, or else to join issue upon the fact that rebels committed the waste charged.

The special traverse concludes with a verification, it puts, therefore, the affirmative of the issue upon the party pleading it, and thus gives him the right to begin and conclude at the trial.

Sec. 1647. A SPECIAL TRAVERSE MUST ALWAYS CONSIST OF THREE PARTS.—A special traverse always consists of three parts, as follows: 1. The affirmative part or *inducement*, which generally introduces new matter, and constitutes the indirect or argumentative denial. 2. The *negative* part, which contains the direct denial, and is called, from the Latin word introducing this part, the *absque hoc*, although similar words, *et non* (and not) might also be used. 3. The *verification* and *prayer for judgment*, with which the form of traverse originally concluded.

The regular method of pleading in answer to a special traverse is to tender issue upon it, with a repetition of the allegation traversed.

The *absque hoc* was necessitated by the rule of pleading that prohibits argumentative denials. The *verification* was required by the rule that wherever new matter is introduced in a pleading, it is improper to tender issue.

Owing to the prolixity of the special traverse and the fact that it delayed the issue by one step, the courts

set themselves against it, and finally laid down the rule that, "where the whole substance of the last pleading is denied, the conclusion must be to the country, but where one of several facts only is the subject of denial, the conclusion may be either to the country, or with a verification, at the option of the pleader."

The *inducement* in a special traverse should be such as in itself amounts to a *sufficient answer in substance* to the last preceding pleading, and it must not consist of a *direct* denial. It must not be in the nature of a confession and avoidance, since this does not deny but rather admits.

The opposite party has no right to traverse the inducement, except where the denial under the *absque hoc* is bad. If the *absque hoc* is sufficient in law, the inducement cannot be confessed and avoided, but if it is insufficient in law the opposite party then has the right to plead in confession and avoidance of the inducement, or to traverse it; or he may demur to the whole traverse for the insufficiency of the denial.

Sec. 1648. PRINCIPLES APPLICABLE TO TRAVERSES IN GENERAL.—The following principles are applicable to traverses in general:

1. A traverse must deny *modo et formo* (in manner and form) as alleged. This is required that the traverser may take advantage of any variance between his opponent's allegations and his proof. But these words, though usually employed, are not so essential that their omission is cause for demurrer, and they are not used

in the general issue of *non est factum*, nor in the replication *de injuria*.

2. A traverse must not be taken upon a *matter of law*. A demurrer is the appropriate form for testing the correctness of an allegation of law. But where an allegation is a confusion of law and fact, it may be traversed.

3. A traverse must not be taken upon matter not alleged, but it may be taken upon matter not expressly alleged, if it is necessarily implied.

4. A party to a deed who traverses it must plead *non est factum*, and should not plead that he did not grant, did not demise, etc. This is to avoid the doctrine of estoppel. For a man is sometimes in law precluded from alleging or denying a fact because by some previous act, allegation, or denial, he has taken a position inconsistent with the one he now desires to take, and such a preclusion is called an *estoppel*. Estoppel may arise: (a) From matter of record; (b) from the deed of the party; (c) from matter in *pais*, that is, matter of fact. Thus, any confession or admission in a pleading in a court of record, whether it be express or be implied from pleading over without a traverse, will,—unless coupled at the time with a saving *protestation*,—forever preclude the party from afterwards contesting the same fact in any subsequent suit with the same adversary. So a recital of a certain fact by the party in any deed which he executes, precludes his denying that fact in any action brought by or against him upon that deed. And where one party accepts rent from another

he is thereby estopped from denying in any action with such party, that the party paying the rent was not in fact at the time his tenant. But a stranger to a deed is not estopped to deny allegations of the deed; hence, when he is sued, he pleads *non est factum*, but not *concessit*, etc.

Sec. 1649. OF PLEAS IN CONFESSION AND AVOIDANCE.—Pleas in *confession* and *avoidance* are divided, with respect to their subject matter, into: 1. Pleas in justification or excuse. 2. Pleas in discharge.

The effect of pleas in justification or excuse is to show that the plaintiff never had any right of action, because the act charged was lawful; while the effect of pleas in discharge is to show some discharge or release of the matter complained of in the declaration; that is, though there was once a right of action, it has been discharged or released by some subsequent matter. This division of the subject applies to *pleas* only. Replications and subsequent pleadings in confession and avoidance are not subject to any such classification.

Pleadings in confession and avoidance, in common with all other pleadings that do not tender issue, conclude always with a *verification* and a *prayer of judgment*.

Every pleading by way of confession and avoidance must give color, that is, it must admit an apparent right in the opposite party, and rely on some new matter by which that apparent right is defeated. Such color as being inherent in the pleadings is called *im-*

plied color; but some circumstances of fact contain no inherent or implied color, and here the pleader wishing to plead by way of confession and avoidance must give color, by which is meant a "feigned matter," pleaded by the defendant in an action of trespass from which the plaintiff seems to have a good case of action, whereas he has in truth only an appearance or color of cause.

By pleading by way of confession and avoidance the defendant gains several advantages: Thus, he spreads his title on record and obliges the plaintiff, if he regards it as not a lawful title as thus exhibited, to demur and present the question to the court, instead of its going along with the other matters to the jury, as would have been the case upon a plea by way of traverse. The plea in confession and avoidance also obliges the plaintiff to traverse or attack but a single link in the defendant's chain of title, and thus to admit all the others as good. Such a plea also gains for the party the affirmative of the issue, and therefore the right to open and close.

The plaintiff was not allowed in his replication to traverse the fictitious matter suggested by way of color; for its only object being to circumvent a difficulty of form, such a traverse would be wholly foreign to the merits of the case.

The practice of giving express color is now confined to actions of trespass, and in those actions to the plea only. It is unusual to resort to any except certain known fictions which long usage has applied to the particular case. The fictitious averment must consist of such matters as, if it were effectual, would sustain the

nature of the action, and the right suggested must be *colorable* only, for if more than colorable the plaintiff would, by the defendant's own showing, be entitled to recover.

Sec. 1650. OF THE NATURE AND PROPERTIES OF PLEADING IN GENERAL.—

The following propositions are to be observed with regard to the nature and properties of pleadings in general: 1. Every pleading must be an answer to the whole of what is adversely alleged. If it answer part only, the opposite party is entitled to take judgment for the part left unanswered, and his omission to do so will be a *discontinuance* or abandonment of the whole action. If it attempts to answer the whole, but is insufficient, then the opposite party's course is to demur to the whole plea. Where the part not answered is immaterial or such as requires not separate or specific answer, the rule does not apply.

2. Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse; and this effect continues through all *subsequent actions* between the same parties. The effect in regard to subsequent actions may be avoided by the practice of *protestation*. And even this does not save the party protesting unless the issue is decided in his favor, unless the matter be such as the party protesting was precluded by some rule of law from taking issue upon. A protestation ought not to be repugnant to the pleading which it accompanies, nor ought it to be taken upon such matters as the pleading itself traverses. As

protestations are made only to save advantages in subsequent suits, any faults in their forms are not subject to demurrer.

The rule requiring a party, at each stage after the declaration, to demur, or plead, does not apply to: 1. Dilatory Pleas. 2. Pleadings in *estoppel*. 3. Where a *new assignment* is necessary. These exceptions may be explained as follows:

1. Dilatory pleas merely oppose a matter of form to the declaration, and do not tend either to deny or to confess its allegations. Replication and subsequent pleadings following on dilatory pleadings are not within this exception.

2. Pleadings in *estoppel* neither admit nor deny the matter of fact adversely alleged, but merely state the previous act, allegation or denial on which the estoppel is declared by the pleader to arise, and pray judgment if the adverse party shall be *received or admitted to aver contrary* to what he before did or said.

3. Declarations are conceived usually in very general terms. In some cases the defendant is not sufficiently guided and confined by the declaration to the real cause of complaint, and thus applies his plea to a different matter from that which the plaintiff has in view. This compels the plaintiff to make, in his replication, a *new assignment*, or statement of his cause of action, in which he guards against a repetition of the defendant's mistakes. Where the plea correctly applies to a part of the injuries complained of, but owing to the generality of the statement in the declaration, fails

to cover the whole, the plaintiff's course is *both to traverse the plea and to new assign*. Thus, in a charge of trespass, if the defendant pleads that he has a right of way over a certain part of the close, and that the alleged acts of trespass were committed by virtue of this right of way, the plaintiff replies by alleging that he brought this action not only for those trespasses mentioned by the defendant, but for others committed on other occasions and at other places, beyond the supposed way, which is usually called a new assignment *extra viam* (beyond the way), or, if the plaintiff means to admit the right of way, he may assign simply, without the traverse. The new assignment should be sufficiently specific, if possible, to prevent a repetition of the defendant's mistake.

Sec. 1651. RULE II.—UPON A TRAVERSE ISSUE MUST BE TENDERED.—The second general rule of pleading is that *upon a traverse, issue must be tendered*. The traverse involves a contradiction or denial of the preceding pleading, hence an issue in fact has been reached, and the rule expresses the sensible requirement that the method of deciding the issue be now adjusted.

The *formulae* of tendering the issue in fact, vary according to the mode of trial proposed. Thus, the tender of an issue to be tried by *jury* is by a formula called the *conclusion to the country*. In this the defendant "puts himself upon the country;" the plaintiff prays that the issue "may be inquired of by the country." There is, however, no substantial difference between

these two modes of expression, and no substantial objection can be taken if they are interchanged.

Where *new matter* is introduced, the pleading should always conclude with a *verification*.

Sec. 1652. RULE III.—ISSUE WHEN WELL TENDERED MUST BE ACCEPTED.—The third rule of pleading is that if issue be well tendered both in substance and form it must be accepted, and the other party may not demur, traverse, or plead in confession and avoidance. The exception to this rule is, that a party may plead in *estoppel* even after issue is well tendered.

The acceptance of the issue, in case of trial by jury, is called the *similiter*, because the usual form of wording it is, "And the said A. B. doth the like." This is added in making up the issue or paper-book. It may be filed or delivered, however, before that transcript is made up, in which case its form is slightly different, and it is called a *special similiter*.

As the party has no option in accepting an issue when well tendered, the entry of the *similiter* is a mere matter of form, and may be made by the party who tenders the issue. But the other party for whom this *similiter* is thus entered, may, if he conceives that the issue is not well tendered, strike out the *similiter* and demur to the defective tender.

The rule that an issue must be accepted, extends to an issue in law also, so that the party whose pleading is opposed by a demurrer is required to accept the issue in law, and the formula by which he does this is called a

joinder in demurrer. Here he is bound to accept, however, for he cannot demur to a demurrer.

So far we have discussed rules which tend simply to the production of an issue.

Sec. 1658. OF RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE—THE GENERAL RULE.—*All pleadings must contain matter pertinent and material.* This is essential to keep the issue from going astray. As where the declaration on assumpsit laying promises by the intestate, should be traversed by the defendant administratrix as to her own promises instead of those of the intestate, such plea would be immaterial and bad.

As to traverses this rule includes the following:

1. A traverse must not be taken on an *immaterial* point; or upon matter the allegation of which was premature; or upon matter of aggravation; or upon matter of inducement. But this last rule does not apply where the introductory matter is in itself essential, and of the substance of the case, for in such a case it may be traversed. Also, where there are several material allegations, the pleader may traverse whichever he pleases, since if he breaks a single link he breaks the chain.

2. A traverse must not be *too large*, nor *too narrow*; that is, it must take in no more, and no less of the allegation traversed than is material.

A traverse may be too large by involving in the issue quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are

immaterial to the merits of the cause. A traverse may also be too large by being taken in the conjunctive instead of the disjunctive, where it is not material that the allegation traversed should be proved conjunctively. On the other hand, a party may, generally, traverse a material allegation of title or estate to the extent to which it is alleged, though it need not have been alleged to that extent, and such traverses will not be considered too large.

A traverse is *too narrow* when it fails to answer fully the whole of the adversary's allegation which it purports or undertakes to answer. So, a traverse may be too narrow by being applied to a part only of an allegation which the law considers as in its nature indivisible and entire, such as that of a prescription or grant. The principle which forbids too narrow a traverse is the same as that which requires that every pleading shall really answer so much of the adversary's pleading as it professes and undertakes to answer.

Sec. 1654. OF RULES WHICH TEND TO PRODUCE SINGLENESS OR UNITY IN THE ISSUE—RULE I.—PLEADINGS MUST NOT BE DOUBLE.—The first rule tending to produce singleness or unity of the issue is, that *pleadings must not be double*.

With respect to the declaration, this rule means that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings, none of them is to contain several

distinct answers to that which preceded it. The reason in both cases is that such pleading tends to several issues concerning a single claim. The rule in terms prohibits only *doubleness* or *duplicity*, but it will include *multiplicity* also. The purpose of the rule is to secure a single issue upon a single subject of claim or defense. The declaration may, therefore, in support of several demands, allege as many distinct matters as are respectively applicable to each. And the plea may make distinct answers to such parts of the declaration as relate to different matters of claims or complaints. Likewise in the replication and subsequent pleadings. But the power of alleging in a plea distinct matters in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction—that none of the matters alleged be such as would alone be a sufficient answer to the whole.

If there be two or more defendants the rule against duplicity is not carried to the extent to compel each of them to make the same answer to the declaration. The defendants may either join in the same plea, or sever, at their discretion. But if they have united in the plea, they cannot *sever* at the rejoinder or other later stage of the pleading. A pleading that contains several answers is double, even though the answers be of different classes. Matter may suffice to make a pleading double, even though it be ill-pleaded. But matter purely immaterial cannot make a pleading double. The purely immaterial matter is surplusage and may be stricken out, no issue can be taken upon it, and

it therefore does not tend to prevent singleness of issue. Nor will matter pleaded only as necessary inducement to another allegation operate to make a pleading double. No matters, however multifarious, will operate to make a pleading double, if, taken together, they constitute but *one connected proposition* or entire point. This applies not only to pleas in confession and avoidance, but to traverse also, so that a man may *deny* as well as affirm, any number of circumstances that together form but a single point or proposition. A traverse of several matters thus connected is called a *cumulative traverse*. But if the matters so connected require when separate, some to be traversed by one species of traverse, and some by another, then a cumulative traverse seems to be improper.

A protestation does not make a pleading double, since it does not tend to an issue, but merely saves to the party the right of denying, in a future suit, between the same parties, the matter admitted in the present suit.

Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same original writ, provided they conform to certain rules which the law prescribes as to joining only such demands as are of a similar quality or character. Such different claims or complaints constitute different parts or sections of the declaration, and are known in pleading by the designation of *counts*.

Sec. 1655. SAME SUBJECT—OF THE USE OF SEVERAL COUNTS.—Distinct causes of actions of the same quality or character may be joined in

one action by the use of separate or several counts for each claim. When several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole; or he may plead a single plea applying to the whole; or he may demur to one or more counts, and plead to the others; or he may plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the pleadings, and the production of several issues.

But whether one or more issues be produced, if the decision, whether in law or in fact, be in the plaintiff's favor, as to any one or more counts, he is entitled to judgment *pro tanto* (for so much) though he fail as to the remainder. All this is quite consistent with the rule against duplicity.

But through this practice of using counts the pleader for the plaintiff, at an early date became able to evade the rule against duplicity by stating what was really but a single cause of action as though it were several—slightly varying his descriptions in each count. His principal purpose in so doing was, of course, to make himself more secure against the insufficiency of any one statement of his cause; also to lessen the possibility of a variance between his allegations and the proof that might develop in the course of the trial. As the court visited no censure upon the pleader, even though the event of the suit showed quite conclusively that he never really supposed himself to be enforcing more than one cause, this practice speedily became universal. The same statement of facts may be varied by omitting in

one count some matter stated in another. In such a case the more special count is used, lest the omission of this matter render the other insufficient in point of law. The more general count is used, because if good in point of law, it will relieve the plaintiff from the necessity of proving such omitted matter in point of fact. If the defendant demur to the more general count as insufficient, and take issue in fact upon the other, the plaintiff has the chance of proving the matter alleged, and also the chance of succeeding in the demurrer. If, on the other hand, the defendant do not demur, but take issue in fact upon both, it will be sufficient for the plaintiff to prove the more general count. The several counts must always *purport* to be founded on distinct causes of actions, and not to refer to the same matter. This is accomplished by the pleader by inserting such words as "other," "the further sum," etc. The pleader may evade the rule against duplicity but the court would be shocked if he were to violate it.

To several counts, or distinct parts of the same count, the defendant may plead several pleas, that is, one to each count.

But in the light of the practice of pleading the same cause of action in different forms, as though there were really several causes, it seemed unjust that the defendant should not be given equal freedom in pleading his defense, so in 1705 it was enacted that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters

thereto as he shall think necessary for his defense." This requires that the defendant, before pleading his several defenses, get leave from the court so to do. Where the defendant pleads several defenses, the plaintiff has the same privilege of demurring to all, or to some, and pleading to the others; or pleading to all, as has the defendant with regard to the plaintiff's several counts.

Though the statute presumably intended to allow one plea for one ground of defense, yet the same relaxation has grown up here as with regard to the plaintiff's several counts. But the court will sometimes refuse leave to the defendant to plead inconsistent pleas.

It will be noticed that the statute extends only to pleas, and does not apply to replications and subsequent pleadings; nor does it apply, it is held, to dilatory pleas. The several matters of defense must be pleaded formally, with the words, "by leave of the court for this purpose first had and obtained." Each one must also be pleaded as a new and further plea, with a formal commencement and conclusion as such. But in all these cases, if the opposite party does not demur, for the duplicity, but instead pleads over, he must answer each matter alleged.

Sec. 1656. RULE II.—IT IS NOT ALLOWABLE BOTH TO PLEAD AND TO DEMUR TO THE SAME MATTER.—The second rule to procure the singleness or unity of issue, is that the pleader cannot both plead and demur to the same matter. This rule does not extend to prohibit one from pleading to one distinct matter and demurring to another. So the

statute authorizing several pleas discussed in the last section, does not allow pleading and demurring to the same matter.

Sec. 1657. OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE—RULE I.—The rules of pleading tending to produce certainty in the issue are numerous, the first of which is: The *pleadings must have certainty of place*. This rule grew out of the former requirement that the 'jurors should be from the locality wherein the cause was alleged to have arisen, thus making it necessary to allege the place with particularity. Such place is called the *venue* of the action, and to allege it in the declaration is to *lay the venue*.

The original writ must be directed to the sheriff of some county, and in that county the action is said to be brought or laid. Each affirmative traversable allegation in the writ is to be laid with a *venue* or place, comprising not only the county in which the fact occurred, but also the parish, town or hamlet within that county; but no such particularity is required in mere matters of inducement. Of the different facts alleged in the writ, it is necessary that some principal one, at least, should be laid in some parish, town or hamlet, within the county in which the action is brought, in order to justify the bringing of the action in that county, and such *county* and the *particular place* so laid within it are called the *venue in the action*, or the venue where the action is laid.

The declaration must have the same venue as the

original writ. . The county where the action is laid is placed at the commencement in the margin of the declaration. And all the different affirmative traversable allegations are to be laid with a venue in parish, town or hamlet, as well as county, in the same manner as in the original writ, and in accordance with it.

In proceedings by bill, the law of venue is the same, except, of course, that there is no original writ, and that the bill first states the venue. The plea, replication, and subsequent pleadings lay a venue to each affirmative traversable allegation, according to the principles already stated, until issue joined.

Under the early law, because jurors were required to be men acquainted with the facts, they were required to be summoned from the venue of the action. Later, as they became transformed into judges of the facts, determining them from the evidence, this requirement became a matter of mere form, and it was considered sufficient if no more than two jurors were from the venue. Finally, in 1865, one of the statutes of jeofails (16 and 17 Car. II, c. 8), provided that "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid." Before that time it had been ground for arresting or reversing judgment in case the jury had been summoned from the *venue in the action* when that differed from the *venue laid to the fact in issue*.

Another statute (4 Anne, c. 16), provided that "every *venire facias* for the trial of any issue shall be

awarded of the body of the proper county where the issue is triable," instead of being, as formerly, awarded from the particular venue of parish, town or hamlet. The joint effect of these two statutes is that the venire now directs that the jury in all cases shall be summoned from the body of the county in which the action is laid, whether or not that be the venue of the fact in issue.

Actions are either *local* or *transitory*. An action is *local* if all the principal facts on which it is founded be local. It is *transitory* if any principal fact be of the transitory kind. And a fact is transitory when it might equally well have occurred elsewhere, as a trespass to a particular parcel of land. The venue of local facts must be truly laid. In transitory facts it need not be; and as the locality of a transitory fact is immaterial, there can be no variance in regard to it.

So in transitory actions the venue may be laid at pleasure, but in local actions must be laid truly. But the plaintiff's freedom to lay the venue of a transitory action where he pleases is checked by a practice of the court to allow the defendant to move the court to have the venue changed so as to be in conformity to the fact. This motion, when supported by affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue will, in most cases, be granted, and the plaintiff obliged to amend his declaration in this regard, unless he, on the other hand, will undertake to give at the trial, some material evidence arising in the county where the venue was laid. The rule is, that while the venue of transitory facts need not be laid truly, it cannot be anything at pleasure, but must be the venue

laid in the action. No venue need be laid with respect to transitory matters in the pleadings subsequent to the declaration, because, with respect to every matter of this description, the original venue will be taken to be implied, but it is usual to lay a venue in these, and is the better course.

When transitory matters are laid out of their true place, they should be laid *under a videlicet*, that is, with the prior intervention of the words, "to-wit" or "that is to say." The effect and object of the *videlicet* is to mark that the party does not undertake to prove the precise place alleged. The proper method of alleging a local matter occurring outside the realm was arranged in this fashion, "In parts beyond the seas, at Fort St. George, in the East Indies, to-wit, at Westminster, in the county of Middlesex." The true place being followed by a *videlicet* and then a county in England. This method is also usually applied to local matters arising within the realm if they happen at a different venue from that laid in the action.

Where place is alleged as a matter of description and not as a venue, it must in all cases be stated truly, under peril of variance.

If no venue be laid in the declaration the defendant may demur, or may plead the defect in abatement. Even in local and penal actions, the only modes of objecting to the venue are by demurrer, or at the time as ground of non-suit.

Sec. 1658. RULE II.—PLEADINGS MUST HAVE CERTAINTY OF TIME.—The second rule tending to produce certainty in the issue, is *that the*

pleadings must have certainty of time. In personal actions the pleadings must allege the time, that is, the day, month and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown. But no *time* need be alleged to matter of mere inducement or aggravation. Wherever it is necessary to lay a venue, it is also necessary to mention time. But in transitory matters *time* occupies a place of importance corresponding to that of *place*; hence the truth of the allegation of time is usually unimportant. But where the time is not stated truly, it must be laid under a *videlicet*, and it should never be so stated as to show an intrinsic impossibility, nor is it ever permissible to have it inconsistent with the fact to which it relates. Such misstatement, if in regard to a traversable fact, would make the pleading demurrable. Whenever time is material, that is, is of the substance of the issue, a misstatement of it is not helped by being under a *videlicet*. So where time is immaterial it should, in subsequent pleadings, follow the day alleged in the declaration and writ. If, in this case, no time is stated in such pleadings, the defect is cured by the verdict or by the judgment; but verdict and judgment do not cure the omission if time is material.

Sec. 1659. RULE III.—THE PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE.—The third rule under this division is that *the pleadings must specify quality, quantity and value.*

Value must be specified in the legal denominations

of the money of the country. Quantity should be specified by the ordinary measures of extent, weight or capacity.

Where the nature of the subject matter will not conveniently admit of exact specification of quality or quantity, loose and general specification is sometimes admitted. In some kinds of actions, as *debt*, and *indebitatus assumpsit*, modern practice does not require quality, quantity or value of the goods sold in the pleading, but the amount due must be pleaded.

It is usually not material that quantity and value be proved as laid when they are laid under a *videlicet*, but a verdict cannot generally be obtained for a larger quantity or value than is alleged. But quality must be strictly proved as laid.

Sec. 1660. RULE IV.—THE PLEADINGS MUST SPECIFY THE NAMES OF PERSONS. —Another rule to produce certainty in the issue is, *that the pleadings must specify the names of persons*. This rule applies to the *parties to the suit*. Each must be described by the true Christian and surname, and if either be mistaken or omitted, it is ground for plea in abatement. So names of dignity are equally important.

So the rule applies to all other persons mentioned in the pleadings with the exception that if the names of any such be not known to the pleader, he should so state, in which case the omission is excused.

Mistake in the name of a *party* is ground for plea

in abatement only; but a mistake in the name of any other is fatal.

Sec. 1661. RULE V.—THE PLEADINGS MUST SHOW TITLE.—Another rule to attain certainty is *that the pleadings must show title*. Under this rule, where a party alleges title in himself or another whose authority he pleads, it is often sufficient to allege a title of possession; that is, that the property is “the goods and chattels of the plaintiff,” or “that plaintiff was lawfully possessed of them as of his own property,” or “the close of the plaintiff,” etc. A title of possession will be applicable, that is, will be sufficiently sustained by the proof of an interest in remainder or reversion. Where a title of possession is applicable, the allegation of it is, in many cases, sufficient in pleading, without alleging title of a superior kind, the rule being that it is sufficient to allege *possession* as against a *wrongdoer*. This does not hold good, however, in *replevin*, or in *real* or *mixed* actions.

Where the rule as to alleging possession against a wrongdoer does not apply, there, though the interest be present, or possessory, it is generally not sufficient to state a title of possession, but some superior title must be shown, and it must be alleged in its full and precise extent.

Where a party alleges *title in his adversary*, it is not necessary to allege it more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim. Usually it is sufficient to allege a merely possessory title, though this is not always so, as, for

example, in suing the defendant for rent. Even where the allegation of possession is not sufficient, the derivation of title, if required to be shown at all, is never expected to be shown as fully and precisely as when the party is pleading his own title. Title is ordinarily, of the *substance* of the issue, and when so it must be proved strictly as laid.

Certain exceptions to the foregoing should be stated. Thus no title need be shown where the opposite party is estopped to deny the title; this is only where the estoppel goes to the full extent of the title which the pleader desires to establish; if it stops short of this point, the title should be alleged.

Sec. 1662. **RULE VI.—THE PLEADINGS MUST SHOW AUTHORITY.**—This rule of certainty, *that the pleadings must show authority*, applies when a party has occasion to justify under a writ, warrant, precept, or any other authority, whatever, he must particularly set it forth in his pleading, and he must also show that he has substantially pursued such authority.

It is not necessary that any person justifying under judicial process should set forth the cause of action in the original suit in which that process issued. And it is sufficient for the officer executing such writ, to plead the writ only, but any other person must plead the underlying judgment as well as the writ.

If an officer justifies, and the writ was *returnable*, he must plead that *it was returned*; otherwise with the

one who has not the power to procure a return to be made.

Where it is necessary to plead the judgment of a superior court it is not necessary to plead any of the previous proceedings; otherwise with a court of inferior jurisdiction, where the jurisdiction is never presumed. Likewise the jurisdiction of foreign courts is not presumed.

But where an authority may be created orally and generally, it is allowable to plead it in general terms. Averments of authority must be *strictly* proved.

Sec. 1663. RULE VII.—IN GENERAL, WHATEVER IS ALLEGED IN PLEADING MUST BE ALLEGED WITH CERTAINTY.—

In accordance with this rule, that *whatever is alleged in pleading must be alleged with certainty*, where the performance of a condition or covenant is pleaded, it must usually be pleaded fully and specifically. But this rule is relaxed where there is such multiplicity of matter as would lead to great prolixity.

And where the condition is for the performance of matters set forth in another instrument, and the matters are in an affirmative and absolute form, and neither in the negative or disjunctive, a general plea of performance is sufficient. Where a bond is conditioned for indemnifying the plaintiff, a general plea of *non damnificatus* is sufficient. But even in these excepted cases, the plaintiff in his replication must show particularly in what way the condition or covenant has been broken.

With respect to all points on which certainty of allegation is required, the allegation, when brought into issue, must usually be proved substantially as laid, with the exception of *place, time, quantity and value*, and even in these cases in certain issues.

Sec. 1664. **LIMITATIONS UPON THE PRECEDING SEVEN RULES.**—There are certain limitations and restrictions placed upon the foregoing rules tending to produce certainty by other and subordinate rules of pleading, as follows:

1. It is not necessary in pleading to state that which is merely matter of evidence.

2. It is not necessary to state matter of which the court takes notice *ex officio*. The court takes such notice of all *public* law, whether common or statute, but not of *private* law, unless the statute expressly so directs. It is necessary also, in some cases, to make mention of the law for the convenience or intelligibility of the statement of fact. As it is unnecessary to state matter of law in a pleading, it is equally improper to make it, when alleged, the subject of traverse.

3. It is not necessary to state matter which would come more properly from the other side. Thus, it is unnecessary to anticipate the answer of one's adversary. It is sufficient that each pleading should contain in itself, a good *prima facie* case. But whatever is essential to a *prima facie* case must be stated. But there are certain pleas which are regarded unfavorably by the courts, as tending to shut out the truth, and these, such as *estoppel*, that the other party is an *alien* enemy, and the like, must

be certain in every particular. They must meet and remove, by anticipation, every possible answer of the adversary.

4. It is not necessary to allege what the law will presume.

5. It is not necessary to allege circumstances necessarily implied.

6. A general mode of pleading is allowed where great prolixity is thereby avoided. The proper extent and application of this rule is largely a matter of practical judgment, only to be obtained by a study of the precedents.

7. A general mode of pleading is often sufficient where the allegation on the opposite side must reduce the matter to certainty. Thus pleading performance in actions of debt on bond, and pleading *non damnificatus* in an action of debt on an indemnity bond may be general. Likewise where the condition is for the performance of covenants or other matters contained in an indenture or other instrument, collateral to the bond sued on, and not set forth in it. But this does not apply where the covenants or other matters mentioned in the collateral instrument are either in the *negative* or the *disjunctive* form, for here the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument.

In pleading performance of matters contained in a collateral instrument, it is necessary not only to crave oyer of the condition and set it forth, but also to make

profert of the collateral instrument and set forth its whole substance.

8. No greater particularity is required than the nature of the thing pleaded will conveniently admit.

9. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

10. Less particularity is required in the statement of matter of inducement or aggravation than in the main allegations.

11. With respect to acts valid at common law, but regulated as to the mode of performance, by statute, it is sufficient to use, in the declaration, such certainty of allegation as was sufficient before the statute. But the plea should show the agreement or other instrument to be in writing, if the statute makes writing necessary.

Sec. 1665. OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING—RULE I.—PLEADINGS MUST NOT BE INSENSIBLE NOR REPUGNANT.—The first of the rules tending to prevent *obscurity* and *confusion* in pleading, is, *pleadings must not be insensible nor repugnant*.

A pleading is *insensible* when, through the omission of material words, and the like, it has become unintelligible. It is *repugnant* when its parts are inconsistent with each other. Repugnancy is ground for demurrer. If the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering

the general sense and effect, it shall, in that case, be rejected, at least if it laid under a *videlicet*, and shall not vitiate the pleadings, for the maxim is, *utile per inutile non vitiatur* (the useful is not vitiated by the useless).

Sec. 1666. **RULE II.—PLEADINGS MUST NOT BE AMBIGUOUS, OR DOUBTFUL IN MEANING, AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED WHICH IS MOST UNFAVORABLE TO THE PARTY PLEADING.**—Under this rule it is sufficient if the pleadings be *certain to a common intent*, that is, if it be clear according to reasonable intendment and ordinary usage, without being absolutely precise.

A *negative pregnant* is such a form of negative expression as may imply or carry within it an affirmative. Such an expression in pleading is faulty under this rule as being *ambiguous*.

Sec. 1667. **RULE III.—PLEADINGS MUST NOT BE ARGUMENTATIVE.**—Another rule seeking to prevent obscurity and confusion in pleading is, that the *pleadings must not be argumentative*. Thus two affirmatives do not make a good issue, for the traverse by the second is argumentative in its nature. It is this rule against argumentativeness that necessitates the *absque hoc* in the special traverse. The vitiating affirmativeness must be in the *effect* of the words used and not merely in their *form*. So a traverse consisting of two negatives is equally bad, and for the same reason.

Sec. 1668. RULE IV.—TENDING TO PREVENT OBSCURITY AND CONFUSION.—Another rule under this division is, *pleadings must not be hypothetical, nor is it permissible to have them in the alternative.*

Sec. 1669. RULE V.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings must not be by way of recital, but must be positive in their form.* Under this rule the pleader is required to positively aver the facts on which his complaint rests, and not put them in a narrative form. The requirement is not so strict in regard to matters of inducement.

Sec. 1670. RULE VI.—IN REGARD TO OBSCURITY AND CONFUSION.—*Things are to be pleaded according to their legal effect or operation.* But there is an apparent exception to this rule in the case of a slander or libel, in which the words themselves must be set forth, as the action turns on the words themselves.

Sec. 1671. RULE VII.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings should observe the known and ancient forms of expression, as contained in approved precedents.*

Sec. 1672. RULE VIII.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings should have their proper formal commencements and conclusions.*

The defendant's pleadings subsequent to the *repliation* follow the same forms of commencement and conclusion as are used in the plea. The plaintiffs fol-

low the same form as in the replication. But to this there are exceptions, as in the case of abatement *de facto*, as by death of the party before verdict, default judgment, and on plea founded on matter arising after the commencement of the action. So pleadings by way of estoppel have commencements and conclusions peculiar to themselves. Likewise in replevin.

If any pleading be intended to apply to part only of the matter adversely alleged, it must be qualified accordingly in its commencement and conclusion.

A defect or impropriety in the commencement and conclusion of a pleading is generally ground for demurrer. But it has been held that it is sufficient if the commencement pray the proper judgment even though the conclusion be improper in form, and so also when the conclusion was correct, although the commencement was informal.

The commencement and conclusion determine the character of a pleading as to whether it is,—in case it be a plea,—to the jurisdiction, or in suspension, or in abatement, or in bar. This is usually expressed in the maxim, *conclusio facit placitam* (the conclusion makes the plea). Hence if the plea contain matter sufficient to make a good plea in bar, but conclude as in abatement, it is plea in *abatement* only, while if it contain only matter sufficient for abatement, and conclude as in bar, it is an insufficient plea in bar, and is bad. Similarly in the replication and subsequent pleadings.

Sec. 1678. RULE IX.—TO PREVENT OBSCURITY AND CONFUSION.—*A pleading which*

is bad in part is bad altogether. The declaration is not within the rule, for it has only to show a cause of action, and worthless matter, beyond that is treated as mere surplusage. If a declaration be good in part, and bad as to another part relating to a distinct demand divisible from the rest, and the defendant demur to the whole instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff. The rule is also applicable only to *material* allegations in any of the pleadings, as mere surplusage does not vitiate the rest of the pleading.

Sec. 1674. OF RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY—

RULE I.—*There must be no departure in pleading.*

A departure takes place, when, in any pleading, the party deserts the ground that he took in his last antecedent pleading and resorts to another.

A departure may be either: 1. In point of fact. 2. In point of law.

In all cases where the variance between the former and the latter pleading is on a point not material, there is no departure. If there were no rule against departure, the parties might shift their ground and delay the issue indefinitely.

Sec. 1675. RULE II.—TO PREVENT PROLIXITY AND DELAY.—*Where a plea amounts to*

the general issue it should be so pleaded. It is held that the court is not bound to adhere to this rule, but that it may in its discretion, allow a special plea amounting to the general issue, if it involves such matter as might be

unfit for the decision of a jury. It is also said that as the court has such discretion, the proper method of taking advantage of this fault is not by demurrer, but by a motion addressed to the court to set aside the plea and enter the general issue instead of it. It appears from the precedents, however, that the objection has frequently been allowed on demurrer.

Sec. 1676. RULE III.—TO PREVENT PROLIXITY AND DELAY.—*Surplusage is to be avoided.* By surplusage is meant, any unnecessary matter, of whatever description. It includes: 1. Matter wholly foreign. 2. Matter not required to be stated. Thus matter of law, matter necessarily implied, matter coming more properly from the other side, and the like, are surplusage.

The statements in a pleading should be terse in manner. Surplusage is not subject for demurrer, but any flagrant fault of this kind will, when brought to the notice of the court, be censured, and the surplusage be ordered stricken out at the costs of the delinquent pleader.

So unnecessary detail in pleading is sometimes dangerous, as it may be so intimately combined with material matter as to require, when traversed, to be proved as laid, thus increasing the danger of variance. When clearly and easily separable from material matter, the immaterial matter cannot be included in the traverse, but otherwise it may be.

Sec. 1677. OF CERTAIN MISCELLANEOUS RULES OF PLEADING.—I. *The declaration should commence with a recital of the original writ.*

II. *The declaration must be conformable to the original writ.* This does not mean that it must be identical with the writ. The declaration states the cause of action more specially than the original writ. But the various statutes of jeofails and amendments have largely deprived this rule of its original force.

III. *The declaration should, in conclusion, lay damages and allege production of suit.* The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration. But the allegation of production of suit is now purely formal.

IV. *Pleas must be pleaded in due order.*

This order is as follows:

Pleas—

1. To the jurisdiction of the court.
2. To the disability of the person. $\left\{ \begin{array}{l} 1. \text{ Of plaintiff.} \\ 2. \text{ Of defendant.} \end{array} \right.$
3. To the count or declaration.
4. To the writ.
5. To the action itself—in bar thereof.

The defendant may plead all these pleas successively; but he cannot vary the order, nor can he plead two pleas of the same kind or degree. A plea of any one of these kinds, renounces the right to plead in that action, a plea of an antecedent kind. These pleas should also be pleaded with *defense*; the word defense meaning denies, and applies to the formula of words used to introduce the various pleas.

V. *Pleas in abatement must give the plaintiff a bet-*

ter writ or bill. The meaning of this rule is that the pleader objecting to a formal defect in the adversary's pleading must *correct* the mistake by pointing out how it should have been alleged.

VI. *Dilatory pleas must be pleaded at a preliminary stage of the suit.* Thus dilatory pleas are not allowable after *full defense*, or plea in bar.

VIII. *All affirmative pleadings which do not conclude to the country must conclude with a verification.* A verification is an offer to *verify* or prove the allegation to which it is attached. It is also called an *averment*. Verifications are of two kinds; *common* and *special*. The *common* verification is that which applies to ordinary cases, and is of this form, "And this the said A. B. is ready to verify." The *special* is used only when the matter is intended to be tried by some other method than by jury.

Although no verification is necessary in the case of a negative pleading, it has become customary to attach a verification to all such as do not conclude to the country.

IX. *All pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made.* This rule applies to deeds. But it includes letters testamentary and letters of administration, since executors and administrators are bound, when plaintiffs, to support their declarations by making profert of these instruments.

This rule applies only to cases when it is necessary to mention the deed in the pleading, and the party claims

under the deed, or justifies under it. No proof is necessary when it is mentioned only as an inducement, or for some collateral purpose. The rule is also confined to cases where the party relies on the direct and intrinsic operation of the deed. The rule does not obtain where the deed has been lost or destroyed through time or accident, or is in the possession of the opposite party, but in these cases the pleading should show the facts.

X. *All pleadings must be properly entitled of the court and term.* The title of the term of court is either *general* or *special*. The *general* title shows the term only, and all pleadings so entitled are presumed to have been filed on the first day of the term named. The *special* title shows the day of the term also on which the pleading was filed, and should be used in the case of all pleadings filed after the first day of the term, if the presumption involved in the general title would occasion any repugnancy.

XI. *All pleadings ought to be true.* Notwithstanding this rule, the practice has grown up of admitting certain *sham pleadings* that are interposed for the purposes of delay. The most common of these is the plea of *judgment recovered*. But no sham pleas will be admitted unless they conform closely to a pretty limited and narrow range of precedents. When a plea is not in the usual and tolerated form of a sham plea, and the matter pleaded is at the same time very improbable, and presumably intended as a sham plea, the court will, on motion, supported by affidavit showing the falsehood

of the plea, allow judgment to be signed for the plaintiff as for want of plea, and make the defendant or his attorney pay the costs. And the court has, in all cases, power to punish for sham pleading, and has often strongly censured the practice.

But this rule does not extend to the various fictions which have been established in connection with pleading, for the promotion of justice.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

LAW OF REAL PROPERTY.

CHAPTER I.

1481. What may be said as to the division of property into *movable* and *immovable*? What is the basis of the American law of Real Property?

1482. Describe the origin of the terms "real property" and "personal property."

1483. What is the distinction between real and personal property?

1484. What is meant by corporeal and incorporeal property?

1485. Explain the use of the words "messuage," "tenement," "land."

1486. Name some of the authorities on Real Property law.

CHAPTER II.

OF AN ESTATE FOR LIFE.

1487. Explain fully the origin of an estate for life.

1488. Describe and explain what is meant by an estate "*per autre vic.*"

1439. What is meant by a "freehold estate?" What were the rights of a tenant for life?

CHAPTER III.

OF AN ESTATE TAIL.

1440. Describe and explain an "estate tail." Into what classes are estates tail divided? Explain the meaning of each.

1441. Explain the early history and construction of an estate tail.

1442. What was the purpose of the Statute "De Donis Conditionalibus?"

1443. Explain the origin of "common recoveries" and the decision in *Taltarum's Case*.

1444. What exceptions were there to the right of the tenant in tail to bar the entail?

1445. Name and explain the right of a tenant in tail.

CHAPTER IV.

OF A FEE SIMPLE ESTATE AND THE RULE IN *SHELLEY'S CASE*.

1446. What is meant by an estate in "fee simple?" What restraints may be placed upon the alienation of such an estate?

1447. Explain fully the origin and effect of the rule in *Shelley's Case*.

1448. Mention four cases to which the rule in Shelley's Case does not apply.

1449. Explain the first two exceptions to the application of the rule in Shelley's Case.

1450. May the effect of the word "heirs" be changed by explanatory words?

1451. Why does the rule in Shelley's Case not apply when the inheritance is grafted on the heirs?

1452. Mention other examples where the rule in Shelley's Case does not apply.

1453. What may be said as to the rule in Shelley's Case being abrogated by statute?

CHAPTER V.

OF REVERSIONS AND REMAINDERS.

1454. Explain the meaning of a "reversion."

1455. What is meant by a "remainder?"

1456. What was the process of conveying a reversion or remainder at common law?

1457. What is the requirement as to when the seizin of a subsequent estate must take effect?

1458. What is the rule as to the kind of an estate necessary to support a freehold remainder?

1459. Explain fully the meaning of "vested" and "contingent" remainders. Give examples.

1460. What is the rule as to construing a grant which creates a vested or contingent remainder?

CHAPTER VI.

OF ESTATES UPON CONDITION.

1461. What is meant by an estate upon condition?

1462. Into what classes are conditions divided? Explain them.

1463. What is meant by a rule of property? Give examples, and explain why a condition subsequent must not violate them.

1464. To what extent may the use of land be restricted in the grant? Give examples.

1465. How is an estate upon condition distinguished from an estate upon conditional limitation?

1466. How is a condition distinguished from a trust?

1467. Explain the nature of an estate upon condition.

1468. What is the nature of an estate upon conditional limitation?

1469. How is the estate over in a conditional limitation distinguished from a remainder?

1470. How does an estate upon conditional limitation differ from an estate tail?

1471. Explain and discuss the meaning and effect of an executory devise.

1472. Explain the effect of a conditional limitation in which the entire estate does not go over to a third person.

1473. Explain how a will may be drawn, giving the

devisee the right to sell, and yet have the remainder go to a third person.

1474. Explain the rule against perpetuities, and when it is violated by executory devises.

1475. Is an executory interest that may possibly contravene the rule against perpetuities valid? Explain your answer.

1476. Does an estate upon condition violate the rule against perpetuities? Why?

1477. Give some of the common examples when an executory devise will be held void.

1478. How is a conditional limitation created?

1479. What is the effect of the breach of the condition in a conditional limitation?

1480. What is the rule against perpetuities at present?

1481. Mention some grants that are not repugnant to the rule against perpetuities.

CHAPTER VII.

LIMITATIONS TO CLASSES OF PERSONS.

1482. Explain what is meant by a gift to a class.

1483. In determining the validity of a gift to a class, what conditions govern?

1484. Give the six rules for determining the validity or invalidity of devises to a class.

1485. Mention and discuss the rules for determining when the class is closed.

CHAPTER VIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

1486. What are the classes of estates which the law creates for the benefit of the family?

1487. Define and explain the estate of dower.

1488. How many essentials to the estate of dower? Explain each.

1489. What are the nature and incidents of a dower estate before it has become vested? Explain fully.

1490. May a wife release her dower to her husband? How?

1491. To what does the estate of dower attach?

1492. What may be said of the nature and quality of the estate subject to dower? Does dower attach to an estate acquired by exchange?

1493. In what ways may lands be discharged of the right of dower?

1494. May there be dower out of dower?

1495. Define and explain the meaning of an estate by curtesy.

1496. What may be said as to the existence of curtesy in the United States?

1497. In what two stages does the estate by curtesy exist? Describe each.

1498. What are the essentials to the creation of an estate by curtesy?

1499. To what estates does curtesy attach?

1500. May the estate by curtesy be barred by will?

1501. How may an estate by curtesy be barred when lands are conveyed in trust to uses?

1502. What are the leading incidents of an estate by curtesy?

CHAPTER IX.

OF JOINT TENANTS AND TENANTS IN COMMON.

1503. Describe and explain what is meant by an estate in joint tenancy.

1504. Describe the incidents arising from an estate in joint tenancy. What is the estate of each tenant?

1505. How may an estate in joint tenancy be severed?

1506. What is the general effect of modern statutes upon estates in joint tenancy?

1507. What is meant by tenants in common? How do such tenants hold?

CHAPTER X.

WHAT PASSES WITH A GRANT OF LAND.

1508. In general what does the term "land" include?

1509. Explain the incidents that pass with a grant of minerals.

1510. How are standing forest trees classed?

1511. How are nursery trees and shrubbery classed?

1512. Explain and discuss the law applicable when a tree extends over the property line.

1518. How is manure classed at common law? Why?

1514. To whom do alluvion deposits belong?

1515. To whom do aerolites belong?

CHAPTER XI.

OF THE ANNUAL PRODUCTS OF THE LAND.

1516. Into what two classes are the products of the soil divided? Of what does each class consist?

1517. What rules govern as to natural fruits of the soil?

1518. How are annual crops or emblements regarded?

CHAPTER XII.

OF RIGHTS AND INTERESTS APPURTENANT TO LAND.

1519. Explain the difference between things which are "appendant" and those which are "appurtenant" to land.

1520. What may be said as to the nature of things which may be appendant or appurtenant to land?

1521. Explain the meaning that will be given the term "appurtenant."

CHAPTER XIII.

SOURCES OF TITLE TO LAND IN THE UNITED STATES.

1522. What land passed to the United States on the acknowledge of Independence?

1523. Mention the various purchases and acquisitions of land by the United States.

1524. Discuss the rights of the Indians to land in the United States.

1525. What may be said of the relation between the Indian tribes and the Federal government?

1526. What may be said as to title by right of discovery?

1527. What was the title to land under Colonial Charters?

1528. What lands were ceded to the general government by the States?

1529. Explain the survey of the Public Lands.

1530. What may be said as to the rights of Riparian owners?

1531. How are sales of the public land effected?

CHAPTER XIV.

COVENANTS OF TITLE.

1533. Explain what is meant by covenants, and name the various kinds of covenants usually found in a deed of land.

1534. Define and explain what is meant by title to land.

1535. Discuss fully the covenant of seizin.

1536. What do you understand by the covenant of the right to convey?

1537. Explain the covenant against incumbrances.

1538. What is included in the term "incumbrance?"

1539. What is the effect of the breach of the covenant against incumbrances?

1540. Discuss fully the covenant for quiet enjoyment.

1541. What is meant by the covenant for further assurance? What is the effect of this covenant?

1542. Define and explain the covenant of warranty.

1543. Discuss "general" and "special" warranties.

1544. What is necessary to constitute a breach of the covenant of warranty?

1545. To what parties does the covenant of warranty extend?

CHAPTER XV.

RECORDING OF DEEDS AND MORTGAGES.

1546. Would it be necessary to record deeds and mortgages independent of statutes?

1547. Where are the records of deeds and mortgages, and the other records affecting title to land kept? How are they entered?

1548. What is the effect of a mistake in the records?

1549. How is proof of title made from the records?

1550. How does the recording laws effect the title of subsequent purchasers?

1551. How is a mortgagee regarded under the recording laws?

CHAPTER XVI.

OF ABSTRACTS OF TITLE.

1552. Why is the subject of abstract of titles important?

1553. What may be said as to the utility of abstract offices?

1554. Explain and discuss the method of examining titles.

1555. What is the liability of an examiner of titles for mistakes and errors therein?

BOOK II.

THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS AT COMMON LAW.

CHAPTER I.

THE SUBJECT INTRODUCED.

1556. What may be said as to the importance of the study of the English common law pleading?

1557. How are rights enforced? What rights has an individual to enforce rights by "self-help?"

1558. What is the means of redressing wrongs or applying remedies when the operation of law is necessary?

1559. Explain what is meant by a "court of record."

1560. Mention and describe the constituent elements of a court.

1561. What sort of judicial machinery existed under the Anglo Saxons?

1562. What change in the system was made by the advent of the Normans into England? Explain fully.

1563. Discuss the origin of the Court of Exchequer.

1564. When and how did the institution of Justices in Eyre and Assizes come to be introduced?

1565. What was the origin of the Court of Common Pleas, or Common Bench?

1566. Explain the origin of the Court of King's Bench?

1567. What was the jurisdiction of the Court of King's Bench?

1568. What was the jurisdiction of the other English Courts?

1569. Explain the consolidation of the English Courts by the Judicature Act of 1873.

1569a. How are courts organized in the United States?

1570. Explain each of the various kinds of jurisdiction.

1571. What may be said as to the scope of the subject of Pleading?

1572. Mention some of the authorities on the subject of Pleading.

CHAPTER II.

OF FORMS OF ACTION AT COMMON LAW.

1573. What is the general classification of actions at common law?

1574. Define "real action," "personal action," "mixed action."

1575. Explain the various kinds of real actions.

1576. What were the kinds of mixed actions?

1577. What were the ancient personal actions?

1578. Discuss fully the early common law action of debt.

1579. Explain the origin and purpose of the early action of detinue.

1580. What may be said of the action of covenant at common law?

1581. How was the action of "account" employed?

1582. What was the use of the writ of *scire facias*?

1583. Discuss the action of trespass, as a formed action. What division of the actions of trespass was there at common law?

1584. Explain the purposes for which the action of replevin was employed.

1585. What may be said as to inadequacy of the formed actions?

1586. What was the purpose and effect of the Statute of Westminster II?

1587. Explain the origin and use of the action of trespass on the case.

1588. Explain the origin and use of the action of assumpsit. What is meant by general assumpsit, or the "common counts?" What could be recovered under the common counts?

1589. Explain the origin and use of the action of Trover.

1590. Explain the early origin and use of the action of ejectment. How and why did the action come to be employed to try title to land? Explain fully.

1591. What was the effect at common law of making a mistake as to the kind of action to bring?

1592. Mention the extraordinary actions.

1593. What is meant by the action or writ of mandamus?

1594. Explain what is meant by the writ of procedendo.

1595. For what purpose was the writ of prohibition used?

1596. What is the use of the writ of quo warranto?

1597. What was the use and purpose of an "information" in England?

1598. For what is the writ of Habeas Corpus used?

1599. Explain the purpose and use of the writs of certiorari and error.

CHAPTER III.

OF THE JOINDER AND ELECTION OF ACTIONS.

1600. Explain what counts might be joined and what might not be joined in the same action.

1601. Explain how and why it might be advisable for a party to choose a particular action in preference to another.

1602. Might a pleader abandon one action and resort to another?

CHAPTER IV.

OF THE FULL PROCEEDINGS IN AN ACTION AT LAW.

1603. What do the proceedings in an action at law include?

1604. What is the meaning of process? How many kinds of process? Explain each.

1605. Discuss and explain fully the use of the original writ as a mode of commencing an action.

1606. Explain the various kinds of original process

at common law after the summons. In what courts might a party be sued without original writ?

1607. What process issued to institute a suit in the United States?

1608. What may be said as to the "appearance" of the defendant? What is the distinction between a general and special appearance?

1609. What is the general purpose of the pleadings? How were they noted?

1610. What duty did the court have in directing the pleadings?

1611. What was the first pleading called? What did it contain?

1612. Explain and discuss the formal conclusion of the Declaration.

1613. If the declaration was insufficient in law, how could it be tested? What kinds of demurrers?

1614. What is the answer of the defendant to the declarations called? Give the classification of pleas.

1615. Explain fully the purpose and object of a dilatory plea. What is the effect if the dilatory plea is sustained?

1616. What is meant by peremptory pleas? What kinds of such pleas?

1617. What is meant by a plea by way of traverse? What was the formal tender of issue in such a plea?

1618. What are the other pleadings on the part of plaintiff and defendant that may be used to arrive at an issue?

1619. What other pleadings of occasional occurrence at common law may be mentioned?

1620. What was the "paper-book" or "demurrer-book?" How was it made up?

1621. What were the various kinds of trial at the early common law?

1622. Discuss the origin of the trial by jury.

1623. What is the process of submitting the facts to the jury? How must the verdict be given?

1624. What is meant by a variance? What is the effect of it?

1625. What is done with the verdict when given by the jury?

1626. How are exceptions taken, and how is the bill of exceptions made up?

1627. What is meant by demurring to the evidence? What issue does it raise?

1628. When is judgment rendered? What steps may be taken before judgment is entered?

1629. In general how is a motion for a new trial supported?

1630. What are the grounds upon which a motion in arrest of judgment may be made?

1631. When should a motion for a verdict "non obstante" be made?

1632. When should a motion for replacer be made?

1633. When will a *venire facias de novo* be awarded?

1634. What is the form of a judgment on a dilatory plea? On the other issues of law or fact?

1635. What is the purpose and effect of the writ of execution?

1636. Explain the forms and purpose of writs of error.

CHAPTER V.

OF THE RULES OF PLEADING.

1637. What are the general objects of rules of pleading? Give the classification of the rules of pleading?

1638. What is the first rule looking to the production of an issue of law or fact?

1639. When is it proper to demur? Explain the nature and properties of general and special demurrers.

1640. What is the effect of pleading over without demurring?

1641. What may be said as to electing whether to demur or plead?

1642. What classification is made by Stephen under the head of pleadings in general?

1643. What is the form of a common traverse? What is meant by a general issue traverse?

1644. What is the effect of pleading the general issue in the various actions?

1645. What is meant by a special traverse, and when might such a traverse be desirable?

1647. What are the necessary parts of a special traverse? What is the answer to a special traverse?

1648. Discuss the rules or principles applicable to traverses in general.

1649. What is meant by pleas in confession and avoidance? How are they divided? What is meant by giving color? Explain fully.

1650. Discuss and explain the principles and properties of pleadings in general.

1651. What is the second general rule of pleadings? What is the formula for the defendant concluding to the country? For the plaintiff?

1652. What is the third rule of pleading?

1653. Mention and discuss the rules which tend to secure the materiality of the issue.

1654. What is the first rule tending to produce singleness or unity in the issue?

1655. Explain the purpose of several counts, to avoid the rule of pleading as to unity in the issue.

1656. Why is it not allowable to plead and demur to the same matter?

1657. What is the first rule tending to produce certainty or particularity in the issue?

1658. Mention and discuss the second rule to produce certainty in the issue.

1659. Mention and discuss the third rule to produce certainty.

1660. Mention and discuss the fourth rule to produce certainty.

1661. Mention and discuss the fifth rule to produce certainty.

1662. Mention and discuss the sixth rule to produce certainty.

1663. What is the seventh rule to produce certainty in the issue?

1664. Explain and discuss the limitations on the seven rules to produce certainty in the issue.

1665. What is the first rule to prevent obscurity and confusion in pleading?

1666. What is the second rule to prevent obscurity and confusion?

1667. Explain the third rule to prevent obscurity and confusion.

1668. Explain the fourth rule to prevent obscurity and confusion.

1669. What is the fifth rule to prevent obscurity and confusion?

1670. What is the sixth rule to prevent obscurity and confusion?

1671. What is the seventh rule to prevent obscurity and confusion?

1672. Give and explain the eighth rule to prevent obscurity and confusion in pleading.

1673. Give and explain rule nine to prevent obscurity and confusion.

1674. Give and explain rule one tending to prevent prolixity and delay.

1675. Give and explain rule two to prevent delay.

1676. Explain rule three regarding prolixity and delay.

1677. Give and explain the eleven miscellaneous rules of pleading.

ABBREVIATIONS.

(SEE ALSO THE ABBREVIATIONS GIVEN IN PREVIOUS NUMBERS.)

- Atk.—Atkyn's Reports, English Chancery.
Am. Dec.—American Decisions Reports.
Beav.—Beavans' Reports, English Rolls Court.
Co. Litt.—Coke on Littleton.
Cox—Cox's Reports, English Chancery.
Cox. C. C.—Cox's Criminal Cases, English and Irish Courts.
Cowp.—Cowper's Reports, English King's Bench.
Doug. or Dougl.—Douglas' Reports, English King's Bench.
Foster—Foster's Reports, English Courts.
Real Prop.—Real Property.
L. R. A.—Lawyers' Reports Annotated.
M. & K. or Myl. & K.—Mylne and Keen's Reports, English Chancery.
N. Dak.—North Dakota Reports, Supreme Court.
Ohio St.—Ohio State Reports, Supreme Court.
Plowd.—Plowden's Commentaries or Reports, English Courts.
Purd. Dig.—Purdon's Digest, Pennsylvania Laws and Reports.
Shep. Touch.—Sheppard's Touchstone.

REAL PROPERTY AND PLEADING AND PRACTICE

LEADING CASES

**SELECTED AND ARRANGED TO COMPLEMENT THE
TEXT ON THIS SUBJECT**

BY

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

CASE BOOK—VOLUME X

**AMERICAN CORRESPONDENCE SCHOOL OF LAW
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PART I.

CASES ON REAL PROPERTY.

CHAPTER I.

THE EARLY HISTORY OF PROPERTY.*

*Of the Distinction Between Real and Personal Property.***

HILL v. WENTWORTH.

28 Vt. 428. 1856.

BENNETT, J. This is a case of very considerable practical importance, and we have endeavored to give it the attention which its importance demands. The charge assumes that, if the machinery in the mill was necessary and usual for the purpose of manufacturing paper, and designed to be and remain in the mill permanently, it became a part of the realty, however slightly it may have been attached to the freehold. There are, no doubt, cases in the books which will fully warrant the charge of the Court, and of that character is the case of *Farrar v. Stackpole*, 6 Greenl. 157, to which we have been referred (and which seems to be an extreme case), while others take an opposite view, and hold that the *annexation* must be substantial, and such that the chattel cannot be severed without substantial injury to the freehold, beyond what shall result from the abstraction of the thing removed. The first inquiry should be, what has been the tendency of our own decisions in relation to the matter?

In *Wetherby v. Foster*, 5 Vt. 136, it was held that potash kettles, set in brick arches, in the usual manner, with chim-

*See Secs. 1431-1436, Vol. 10, *Cyclopedia of Law*.

**See Secs. 1433-1435, Vol. 10, *Cyclopedia of Law*.

neys to the arches, and used in manufacturing purposes, still remained personal property. The Court said, p. 142, if the kettles were fastened to the freehold at all, it was temporary merely, and the injury to the brick-work, in taking them out, *was too trifling to designate them real estate while there*. In Tobias v. Francis, 3 Vt. 425, the questions arose between the mortgagee and a creditor of the mortgagor, and it was held that carding machines, in a woolen factory, and connected by a band with other wheels in motion, by which they were propelled in the usual way, and which remained stationary by means of their own weight, were still personal property, and, as such, might be attached and taken away.

In Sturgis v. Warren, 11 Vt. 433, the question also arose between the creditors of the mortgagors and the assignee of the mortgagee, and the carding machines were affixed to the factory building in the usual manner, *some with nails, some with spikes and screws, and some with cleats*, and yet, upon the authority of the case of Tobias v. Francis, they were held to be personal property. In Cross v. Marston, 17 Vt. 534, the case of drawers, and the sash case were placed in a building which was fitting up for a book store. The case of drawers was nailed to the wall, and open shelves were placed in the space above. The sash of the show-case was used to cover an open book-case, which was permanently fastened to the wall of the building—the sash sliding in a place before the book-case, and being fastened in by strips of boards nailed above and below. The question arose between vendor and vendee, and the case was made to turn on the question whether the chattels had, by the manner of their *annexation* to the freehold, lost their *personal identity as chattels*, and it was held that they had not, the Court applying, *as a test*, the fact that the articles could have been taken out of the building without injury to themselves, or the building, which was assumed both by the counsel and the Court, although, from the report of the case, I do not see that it was a fact distinctly found in the bill of exceptions. From the cases already decided in this State, upon a subject which, from its very nature, is perplexing, and rendered more so by the conflicting views of different Courts, it is quite evident our Courts have assumed the ground that a chattel is not to lose

its personal identity, as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend there is no sufficient reason why we should, at the present day, recede from the ground already taken by our Courts. It is certainly sustained by many well-considered cases.

In *Swift v. Thompson*, 9 Conn. 63, the spinning frames in a cotton factory stood upon the floor, and were kept in their place by means of cleats nailed to the floor around them, and there was other machinery, to the posts of which iron plates were attached, through which wood screws passed, fastening them into the floor, but by unscrewing them the machinery could be removed without injury to it or the building, and it was held that the whole machinery remained personal property. Daggett, J., says it is material to consider that the machinery was thus attached to the building to render it stable, and that the criterion established by the rules of the common law is, *could this property be removed without injury to the freehold?* See, also, *Taffe v. Warwick*, 3 Blackford, 111. The New York cases are very full on this point: *Cresson v. Stout*, 17 Johnson, 116; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Chauffetete*, 5 Denio, 527, and *Vanderpool v. Van Allen*, 10 Barbour, 157. So in a recent case in Ohio, *Teafft v. Hewett et al.*, 1 Ohio N. S. 5-11, where the subject was examined at great length, and with ability, it was held that the machinery in a woolen factory, connected with the motive power of the steam engine by bands and straps, and only attached to the building by cleats or other means to confine it to its proper place for use, and could be removed without injury, was but chattel property. The case of *Gale v. Ward*, 14 Mass. 352, in its facts, is much like the case of *Tobias v. Francis*, in our own reports. In that case, Parker, C. J., says, *though in some sense attached to the freehold, yet they (the machines) could easily be disconnected, and used in buildings erected for similar purposes.*

Upon the subject of fixtures, in the English law, the case of *Elwes v. Mawe*, 3 East, 38, and reprinted in *Smith's Leading Cases*, may well be considered *the leading case*. In that case,

and in the notes to it by Mr. Smith, and the American editor, most of the law on that subject is collected.

In a case decided in the Court of Exchequer, in 1851, *Hellawell v. Eastwood*, 6 Welsby, Hurlstone & Gordon, 295, it was held that machinery, consisting of certain cotton spinning-machines, some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, were still personal property. B. Park said the only question was, whether the machines, when fixed, were a parcel of the freehold, and this was a question of fact depending on the circumstances of each case, and principally on the two considerations, first, the mode of annexation to the soil or fabric of the house, and the *extent* to which it was united to them, whether it could be easily removed without injury to itself or the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*.

He added, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal, without the least injury to the fabric of the building, or to themselves; and the object and purpose of the annexation was not to *improve the inheritance*, but merely to render the machines steadier and more capable of convenient use, *as chattels*. In that case, it is true, the question arose between landlord and tenant, and in such a case, it is said in the English law, the greatest indulgence is shown to the tenant, where the annexations are made for the purposes of trade or manufactures. No doubt in England, in relation to fixtures, different rules have been held to prevail; and between heir and executor, a strict rule has been adopted, and the same rule seems to have prevailed between vendor and vendee, and between mortgagor and mortgagee; and the English cases show that there is no relaxation of the rule, as applied in these latter cases, even between landlord and tenant, where the erections are made *solely for the purposes of agriculture*, although beneficial and important in improving the occupancy of the estate. We apprehend that much of the confusion in the au-

thorities upon the subject of fixtures, may have had its origin in the fact that different rules have been attempted to be applied to different relations, and these different relations have sometimes been lost sight of.

It is said by Collamer, J., in *Sturgis v. Warren*, 11 Vt., that "in this State, and especially under our attachment law, it is difficult to recognize any such distinction."

In *Dubois v. Shelley et al.*, 10 Barb. 496, it was held the same rule should be applied, as to fixtures, whether the erections were for agriculture and other purposes, or for the purposes of trade, and between landlord and tenant.

In *Van Ness v. Pacard*, 2 Peter's U. S. R. 145, it is strongly intimated that, in this country, there should be no different rule applied, whether the erections were made for the purposes of trade and manufactures, or purely for agricultural purposes.

We think the rule in this State should be that the various articles of machinery belonging to a manufactory are, in no respect real estate, excepting as they are a part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose, and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold, or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. In the construction of a building, many things, which in themselves are chattels, as doors, window-blinds, shutters, etc., become a part of the building, and, in such cases, the manner of annexation is of no particular importance. But to make the test, whether fixture or no fixture, to be found in the relation which the chattel bears to the use of the freehold, is, to us, unwise, and against well-considered cases. The rule requiring actual annexation is not affected by those cases where a constructive annexation has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture.

In determining the character of what the plaintiff claims to be fixtures, or a part of the realty, we must not only have reference to the manner and extent of the annexation, but also to the object and purpose of it. Whether the articles in question were personal property, or fixtures, should be determinable, and plainly appear, from an inspection of the property itself, taking into consideration their nature, the mode and extent of their annexation, and their purpose and object, from which the intention would be indicated.

To change the nature and legal qualities of a chattel into a fixture, requires a positive act on the part of the person making the annexation, and, his intention so to do should positively appear, and, if this be left in doubt, the article should be held still to be personal property.

We see no reason why the case of the potash kettles, in 5 Vt., should not govern this, as to the iron boiler. It was set in a brick-work, resting upon a stone foundation placed upon the ground, and the floor of the building was simply laid up to it, and it was in no other way attached to the building. So in *Hunt v. Mulanphy*, 1 Missouri, 508, a kettle and boilers put up in a tannery, with brick and mortar, was held not to be a fixture. See, also, *Reynolds v. Shuler*, 5 Cowen, 323, and *Raymond v. White*, 7 Cowen, 319, which was the case of a heater used for applying heat to tanners' bark, in vats and leaches.

*We think the four engines, used for grinding rags into pulp, cannot be regarded as a part of the paper-mill, or as annexed to it, so as to become a part of the realty. These were fixed in large oval tubs, in the usual way, the tubs standing on timbers, and the floor of the building scribed up to them, and the engines were carried and operated by means of a band connecting them with the iron shafting from which was communicated to the engines their motive power. There can be no ground to claim that the tubs in which they stood were a part of the realty, and the band was used to give the engines motion, and not for fastening them to the freehold. It could be slipped off, and put on, to give them motion, or arrest it, at the will of the operator, and they could be removed without injury to the building, or the engines. The case of *Winslow v. Merchants' Insurance Company*, 4 Met. 306, where it was held*

that a steam engine and boilers, and the machines for working iron, upon which they operated, were fixtures, and a part of the realty, is expressly put, so far as relates to the machines for working iron, upon the manner in which they were fitted and adapted to the mill. The words "fitted and adapted to the mill" seem to imply something more than being set down upon the floor, and fastened for convenient use, but rather a peculiar adaptation and fitting to that particular location and mill. The building was a machine shop, and the steam engine furnished the *motive power* which moved the whole machinery in the several stories of the building, by means of connecting bands or otherwise. In regard to the case of *Gale v. Ward*, 14 Mass., C. J. Shaw, in 4 Metcalf, observed, "we do not think that an authority opposed to this opinion, because it is manifest that the Court, in that case, regarded the carding machines, though ponderous and bulky, as essentially personal property, which might have been attached and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner in his own mill, for his own use." Besides, so far as the steam engine is concerned, it may be said of the case in 4 Metcalf, it furnished the *motive power* for the whole building, and may be regarded as an appurtenant to the machine shop, as much so as the water power of a grist-mill, or a paper-mill. The paper presses were kept in their places by means of cleats at the top, nailed to the floor, and at the bottom by iron screws, and by taking off the iron nuts they could be removed without injuring or disturbing the building.

In regard to the iron frame in which the calendar rolls stood, it seems that was simply kept in place by means of screws at the toes of the frame, connecting it with timbers upon which it stood, and the timbers made fast to the floor by means of spikes. This could be easily removed by unscrewing the toes of the frame. The rag-cutter stood in a wooden frame, standing on the floor, and was not otherwise confined.

The trimming press was set also in a frame, and this only screwed to the floor.

The machine for making paper was kept in place by means of cleats around it, nailed to the floor, and not otherwise

fastened to the building. If we regard the iron boiler as personal property, most clearly the iron pipes connected with it only by screws and bolts, which the case says could be easily taken off, should be regarded in the same light.

The iron shafting put up in the building for the purpose of turning and putting in motion the machinery, by means of hangers of iron bolted to the beams and sills of the building, we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the *motive power* to the machinery, and should be regarded as part of the mill, as much as a water-wheel, by which a water-power is called into existence.

Though the paper-mill was placed upon the premises subsequent to the execution of the mortgage, yet it would inure to the benefit of the mortgagee, and also carry with it all that can be regarded as incident to, or a component part of the mill, but the machinery and articles which the mortgagors placed in the building, to be used by them in their business as manufacturers of paper, and not permanently attached to the building or freehold in such a manner that they could not well be removed without material injury to the chattel or freehold, did not lose their personal identity as chattels, and become a part of the realty. This, we think, has long been the views of our Courts upon this subject.

The result will be that, so far as the irons in question either constituted the whole, or were a part of the machinery, of *such a description and character*, they remained the personal property of the mortgagors, after the fire, the same as the machinery was before the fire, and the plaintiff's right of recovery should have been limited at least to the value of the iron which was used in construction of the building, such as nails, spikes, etc., and the iron shafting used for the purpose of putting and keeping the machinery in motion, and such iron, if any, as was permanently fixed or fastened to the building so as to be annexed to and become a part of the realty, according to the foregoing views.

Whether it was of any importance that the plaintiff should have taken the actual possession of these irons, after the fire, so as to perfect and keep good his title, as against the creditors

of the mortgagors is a point not made in the case, and one which we have not considered, and much less decided.

JUDGMENT REVERSED AND CAUSE REMANDED.

MICHIGAN MUT. L. INS. CO. v. CRONK.

93 Mich. 49; 52 N. W. 1035. 1887.

MONTGOMERY, J. The defendant, on the 18th day of June, 1887, contracted in writing to purchase of one William L. Jenks the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 19, township 7 N., range 16 E. The contract was in the usual printed form, and contained a covenant on the part of the defendant that he would not commit, or suffer any other person to commit, any waste or damage to said lands or buildings, except for firewood or otherwise, for home use, while clearing off the lands in the ordinary manner. Immediately after entering upon the lands he erected a small dwelling house thereon, and lived in it for two years. He then made default in his payments, and the plaintiff, to whom the contract had in the meantime been assigned by Jenks, terminated the contract, and required the defendant to surrender possession. The house was a one-story frame house, 20 by 26, and suitable for the purposes of a dwelling house to be used upon the land in question. After the removal of the house from the premises, it was placed upon a lot across the street, and plaintiff, after demand, brought replevin. The circuit judge directed a verdict for the plaintiff, and the defendant appeals.

Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was, therefore, real estate; *second*, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party. We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. *Kingsley v. McFarland* (Me.), 19 Atl. Rep. 442; *Milton v. Colby*, 5 Metc. (Mass.) 78; *Iron Co. v. Black*, 70 Me. 473; *Tyler Fixt.* 78. It being sev-

ered from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon the land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of *Morrison v. Berry*, 42 Mich. 389; 4 N. W. Rep. 731; and *Wagar v. Briscoe*, 38 Mich. 587, do not apply. The house remaining personal property in the wrongful possession of defendant, it follows that no homestead right, which consists in an interest in lands, attached.

The judgment is **AFFIRMED**, with costs. The other justices concurred.

SNEDEKER v. WARING.

12 N. Y. 170. 1854.

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corliss v. Van Sagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Mete. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the

rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the latter authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; *Hilliard on Mortgages*, 294, note f, and cases there cited; and see *Bishop v. Bishop*, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American courts deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or whatever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the

realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures and statues used to spout water at fountains, were regarded as immovable, or real. Pandects, lib. 19, tit. 1, § 17, vol. 7, by Pothier, 107; though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments. Corp. Juris. Civ., by Kreigel, lib. 19, tit. 1, § 17; Poth. Pand. 109; Burrill's Law Dic. "Affixus." But Labeo held the rule to be "*ea quæ perpetui usus causa in ædificiis sunt ædificiæ esse; quæ vero ad præsens, non esse ædificiæ*;" thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by the civilians, "its destination;" Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, § 17.

And Pothier says that when, in the construction of a large vestibule or hall niches are made, the statues attached ("attachées") to those niches make part of the house, for they are placed there *ad integrandam donum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues; and, he says, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt*:" Pothier de Communauté, § 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap., § 525. But statues standing on pedestals in houses, court-yards, and gardens retain their character of "movable" or personal. 3 Touillier, Droit Civil de France, 12. This has

reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, § 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work, page 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("*vide choquant*"), a foundation and base no longer appropriate or useful. Ib., § 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament. 2 Ledru Rollin, Répertoire Générale, 514, § 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its base, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the

French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the court of Cassation in France, in *Hornelle v. Enregistr*, 2 *Ledru Rollin*, *Journal du Palais*, *Répertoire*, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues, placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real

property because it is attached by its own weight alone to the foundation designed to give it perpetual support. (See to that effect, *Oakland Cemetery Co. v. Bancroft*, 161 Pa. St. 197.)

It is said the statue and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only in their own weight. Yet that has been found sufficient to preserve many of them undisturbed for 4,000 years. *Taylor's Africa*, 113 *et seq.* And if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the pyramids of Egypt, or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guarantee of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be REVERSED.

DOOLEY v. CRIST.

25 Ill. 551. 1861.

WALKER, J. Appellee claims the building in controversy under his purchase, at the constable's sale, on the execution against Whitelock and Philips. On the contrary, appellant claims it as a part of the real estate of which he was the owner. This then involves the inquiry whether it was real or personal property. It is a fundamental rule that real estate embraces lands, tenements, and hereditaments. All improvements or additions of a permanent nature and adapted to its use and better enjoyment, placed upon land, are regarded as forming a part of the land. To this rule there are the exceptions of trade fixtures, which cannot have any application to this case. By express agreement between the parties, erections placed upon the land by the tenant during the term may be removed as personal property; or if the owner of the soil were by deed to sell a tenement erected upon the land, it would no doubt become dissevered, and converted from real to personal property. But as a general rule, when a building is erected on land, the presumption is that it is a part of the real estate and not personal property, and to take it out of the operation of the rule, a state of facts must be shown which rebuts the presumption. Even when a stranger constructs a building upon the land of another, without his consent, it becomes a part of the land, and he would become a trespasser by removing it.

This record affords no evidence from which it can be inferred that the appellant, who was the owner of the soil upon which this building was erected, ever consented that it might be removed. He had contracted to sell the land to Mrs. Philips, but that agreement was afterward rescinded, and when the contract was abandoned by the parties, appellant became undeniably the owner of the land and its improvements, but in law and equity, as no reservation seems to have been made of the house or other improvements. When Whitelock agreed with Philips for the purchase of the acre of land upon which the house was built, and which was embraced in Mrs. Philips' purchase, there seems to have been no reservation or agreement for the removal of the house in any event. Whitelock gave an acre

of the land, purchased of appellant, in exchange for the acre upon which the house was erected, and they each entered into possession of the portion thus received in exchange, and so continued until their several contracts were rescinded or abandoned, neither having paid for the land purchased of appellant. This building was a part of the improvement connected with Whitelock's purchase, and it must have been made with the design of permanently remaining on the land, and not for any temporary purpose.

If the intention of Whitelock was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property, rendering it liable to levy and sale on an execution from a justice of the peace. The intention at the time to render it a part of the realty fixed its character beyond all dispute, and that character could not be changed by anything short of its severance by removal or by an executed agreement for that purpose. The mere change of the intention of the owner cannot have that effect. This principle was announced by the first of appellant's instructions, in the series which the Court refused to give, and it should have been given. The Court below having erred in refusing to give that instruction, the judgment below must be REVERSED, and the cause remanded.

JUDGMENT REVERSED.

PLUMMER v. HILLSIDE COAL & IRON CO.

160 Pa. St. 483.

Appeal from court of common pleas, Lackawanna County; Fred. W. Gunster, Judge.

Trespass q. c. by Emma A. Plummer against the Hillside Coal & Iron Company and the Lackawanna Coal Company, Limited. Judgment for defendants. Plaintiff appeals. Affirmed.

WILLIAMS, J. The learned counsel for the appellant states the point in controversy very fairly and clearly in the opening

sentence of his printed argument. He says, "The contention in this case is confined to the effect and subsequent history of the Calendar lease dated the 1st of October, 1828." His position is that the lease granted only an incorporeal right to the lessee, to be exercised upon the premises covered by the lease. The appellees, on the other hand, contend that it granted the coal in place, under the land, absolutely. The words of the instrument upon which this question depends may be put together thus: "Samuel Calendar * * * doth lease and to farm let to Thomas Merideth * * * all the land that he now holds, * * * and the lease is to continue for the term of one hundred years from this day. Possession of the leased premises shall extend only to their use as a coal field. The lessee shall have full power and possession to search for coal anywhere on the leased premises, in any manner he may think proper, to raise the coal, when found, from the beds; to enter and carry away coal; and to sell the same for his own benefit and profit. He may occupy whatever land may be useful or necessary as coal yards, * * * for roads for transporting the coal; and in case it may prove necessary for securing the full enjoyment of the premises aforesaid as a coal field, as aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper." The purchase money or price of the coal is fixed at \$200. If the coal proved abundant, and of a given thickness, then another \$100 was to be paid. In addition to this the sum of \$1 per annum was to be paid, as rent. The lessor reserved out of this grant the right, for himself and his heirs, to take coal for their own use, so long as they should reside on the land. This instrument contemplated a sale of the coal under the leased premises at a fixed price, to be increased \$100 if the quantity of coal reached the proportions described in it. The right of removal was to be exercised within 100 years. The fact that the instrument is in the form of a lease is not material, when the charter of the transaction is apparent. *Kingsley v. Iron Co.*, 144 Pa. St. 613; 23 Atl. 250; *Montooth v. Gamble*, 123 Pa. St. 240; 16 Atl. 594. A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore

in fee. *Fairchild v. Furnace Co.*, 128 Pa. St. 495; 18 Atl. 443, 444. Such a conveyance operates to sever the surface from the underlying stratum of coal; and after such severance the continual occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the statute of limitations. To affect the title of the owner of the coal, there must be an entry upon his estate, and an adverse possession of it. *Armstrong v. Caldwell*, 53 Pa. St. 294. *But the contention that a right to mine coal in the land of another is an incorporeal one cannot be successfully maintained. The grant of such a right is a grant of an interest in land. Hope's Appeal (Pa. Sup.), 3 Atl. 23. When the grant is, in terms or in effect, a grant of all the coal on the lessor's land, this amounts to a severance of the coal from the surface, and vests a title to the underlying stratum in the grantee. Sanderson v. City of Scranton, 105 Pa. St. 469. This underlying estate may be conveyed under the same general rules, as to notice as to recording, and as to actual possession, as the surface. After such a severance the possession of the holder of each estate is referable to his title. The owner of the surface can no more extend the effect of his possession of his own estate downward than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations. The owner of the surface can be affected only by the invasion of the surface. The owner of the underlying stratum is not bound to take notice of the invasion of the estates that do not belong to him, but when his own estate is invaded he is bound to take notice. The conclusion thus reached disposes of the title by possession set up by the plaintiff, and of her right to recover in this case.*

The appellant cites *Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. 732; *Menish v. Stone*, 152 Pa. St. 457; note 25 Atl. 732,—and other cases in which oil leases were considered, and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil, and, in case oil is found in paying quantities on the leased premises to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land, beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful, and

the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and, finding nothing, gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the case cited. The difference in the nature of the two minerals, and the manner of their production, have, however, resulted in considerable differences in the forms of the contracts of leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory, and bring to the surface oil that when in place, in the sand rock, was under the lands of adjoining owners, makes it important for each land owner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end, or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases, regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of *Oil Co. v. Fretts, supra*, is not capable of application to the lease made by Calendar to Merideth in 1828, for several reasons: First, the Calendar lease is, in effect, a sale of all the coal in the leased premises, and subsequently a severance of the surface therefrom. Second, it is for 100 years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. Third, the consideration of the grant was, not the development of the mineral value of the land, but the price fixed by the agreement, and actually paid to the lessor in money. Upon a careful examination of the several assignments of error, we are all of opinion that the judgment must be **AFFIRMED**. Judgment will be entered accordingly.

LEMAR v. MILES.

4 Watts, 330. 1835.

SERGEANT, J. The general principle is that a fixture erected by a tenant on demised premises, for the purpose of carrying on his trade, is personal property, and may be removed or levied on by *fiery facias* against him, and at his death, if not disposed of, passes to his executor. In *Lawton v. Lawton*, 3 Atk. 13, a fire-engine set up for the benefit of a colliery by a tenant for life was considered part of his personal estate, passing to the executor as assets, and not to the remainderman as annexed to the freehold, it being for the benefit of the public to encourage tenants to do what is advantageous to the estate during their term. The same point was afterward decided in *Dudley v. Warde*, Amb. 113, where an engine of a similar kind was considered part of the personal estate, whether erected by tenant for life or in tail. In *Van Ness v. Packard*, 2 Peter's S. C. Rep. 137, the subject is carefully examined by Justice STORY, and the tenant was there held not to be liable for pulling down and removing a wooden dwelling-house, with a cellar of stone or brick foundation, and a brick chimney, which he had erected on a demised lot of ground for a term of years reserving rent, with a view of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business. The present is the case of a steam engine set up by the tenant on the demised premises and used in lieu of horse-power, for more advantageously carrying on the manufacture of salt. It must, therefore, be deemed personal property belonging to him, and as such liable to be seized and sold on the execution of his judgment creditor. In *Gray v. Holdship*, 17 Serg. & Rawle, 413, the copper kettle in the brew-house was erected by the owner of the inheritance, and would have passed to the purchaser of the building unless specially reserved; it was, therefore, part of the building within the mechanics' lien law. The case of *Morgan v. Arthur*, 3 Watts, 140, was determined on the same grounds. But here the engine was purchased and erected by the tenant, and was never part of the inheritance.

It is supposed, however, that the terms of this lease form an exception to the general rule. There is a covenant on the part of

the lessees to bore the wells to the depth of five hundred feet if practicable, and as much deeper as they please, and to make all additional and necessary erections at their own expense. It is afterward declared that should the wells fail at any time during the lease the lessees were at liberty to give them up by paying up the rent to the time of said failure; and should such failure take place within the term of three years the lessees were at liberty to take away all the metal and improvements of the works, or be paid the value thereof, at the choice of the lessor. This covenant seems to contain an implication that if the lessees gave up the works after the three years, on account of failure of the water, the erections were to belong to the lessor. The reason of this covenant is not very clear; but, perhaps, it was thought right they should remain as an indemnity to the lessor for his loss, where the lessees had enjoyed the strength of the wells during, perhaps, a larger part of the term. But there was no surrender on account of failure; for although one witness for the plaintiffs said he thought the water failed the first year, he explained by saying it got weaker; it was not more than half as good, perhaps. He also states that the well was not given up to Lemar. The event contemplated, then, never occurred; and the rights of the parties can only be adjusted by the application of the usual legal principles. Besides, I am inclined to think this clause refers to erections of a more real and permanent character than an engine. The words "metal and improvements" may comprehend all permanent fixtures of iron or other metal, and all buildings, whether dwelling-houses, stables, sheds, walls, or of whatever kind, set up for the purpose of carrying on the business more conveniently; the right to remove which might have been considered as questionable, unless expressly agreed to. But for an article in itself decidedly personal, it was not necessary to make such provision, and it ought not by implication to be applied to it.

JUDGMENT AFFIRMED.

TAFT v. STETSON.

117 Mass. 471. 1875.

AMES, J. *The steam engine, with the boiler and its appliances, was furnished and set up upon the premises by the defendant, who at the time had no title in the estate. The agreement between him and the owner was that these additions to the premises should continue to belong to him, with the right to remove them whenever he saw fit. They were, therefore, personal property:* Howard v. Fessenden, 14 Allen, 124; Morris v. French, 106 Mass. 326; Hartwell v. Kelly, *ante*, 235; and never became the property of the mortgagor, and, of course, did not pass by and were not included in the mortgage. They were rightfully sold by the defendant as his own property, and there is no reason why he should be held accountable to this plaintiff for the proceeds of the sale.

With regard to the rent of the house, it does not appear that any was collected by the defendant, or that any was left uncollected by his fault or neglect. The house was occupied under a claim of right, adversely to the defendant. There having been no release of the homestead, the occupation of the house by the mortgagor and his family was rightful: Silloway v. Brown, 12 Allen, 30.

DECREE AFFIRMED.

OSGOOD v. HOWARD.

6 Maine, 452. 1830.

MELLEN, C. J., delivered the opinion of the Court, in Cumberland, in August following: The question in this case seems to be a new one; or, in other words, the decision of it requires the application of certain well-settled principles to certain facts, where the application of them appears to be considered as a novelty. The facts before us are few and simple, and we wish to be understood as not extending our decision beyond those facts as they have been found by the jury. Cases whose general character might resemble the present, may easily be imagined to

involve several interesting and intricate inquiries, the solution of which might be attended with many difficulties. But the finding of the jury has excluded them all from the case under consideration. The buildings whose value is demanded in this action of trover were the absolute property of Henry Howard, the deceased, at the time of his death. The land on which they were erected was then, and continues to be, the property of the defendant. They were erected on the land by his express consent. The buildings have been fairly purchased by the plaintiff, and they are his absolute property; and the defendant has converted them to his own use. Now, the question is, why should not this action be maintained? Almost all the cases which have been cited on both sides are those between lessor and lessee, or heir and executor, and they were decided upon principles of policy, or the mere nature of the property in question, independently of any express contract in relation to this subject—the former according to those usages between landlord and tenant which were established and respected for the benefit of trade, and, in some instances, of husbandry; and the latter accordingly as the subject in question partook most of the realty or personalty—whether attached or not to the freehold. We apprehend that such cases cannot be of much use in the determination of the case at bar; for in this the express agreement between the defendant and his son as to the erection of the buildings converted by the defendant places the subject on other grounds, and at once settles the respective rights of the owner of the land and the owner of the buildings. *It is not denied that if one erects a building on the land of another wrongfully, the building immediately becomes attached to the freehold, and the property of the owner of the land; but the case is different in respect to erections which are sanctioned by the relation between landlord and tenant; and for reasons still stronger, when buildings are erected by one man on the land of another, under his express license and agreement, as was the fact in the instance before us. The case of Wells v. Banister et al., 4 Mass. 514, seems directly in point. There the facts were that a son built a dwelling-house on his father's land, and by his express permission. The Court, then consisting of PARSONS, C. J., and SEWALL and PARKER, Justices, in giving the opinion, say "the property of the house is personal property of*

the son, he having no estate in the land." We understand that, among the profession, this is the principle recognized and acted upon in practice, that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the above-mentioned principle and practice, we should open a door to innumerable frauds which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission; and thus, in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations at the expense of his defrauded creditors; for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution, and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects, nor credits of the builder. We do not perceive any reason why there should not be judgment on the verdict.

JENKINS v. McCURDY.

48 Wis. 628. 1879.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of fire-wood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as fire-wood or filling; and that afterward Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the questions of law are neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty: *Tyler on Fixtures*, 59, 116; *Ewell on Fixtures*, 31; *Conklin v. Parsons*, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings, and other refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for fire-wood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The Circuit Court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a clear preponderance of the evidence as would warrant us in reversing them: *Green v. Feil*, 41 Wis. 620, and numerous other cases in this Court, and make this the true test for the exercise of this right by this Court.

By THE COURT.—The judgment of the Circuit Court is **AFFIRMED**, with costs.

CHAPTER II. OF AN ESTATE FOR LIFE.*

*Incidents of an Estate for Life.***

JENKS v. HORTON.

96 Mich. 13; 55 N. W. 372.

Bill by William L. Jenks against Rebecca Horton to establish a lien for taxes paid by complainant on certain premises, and to compel the payment of other taxes assessed on said premises. Decree for complainant. Defendant appeals. Modified and affirmed.

The agreed facts in this case are as follows: (1) Prior to May 8, 1869, the ownership of the land was in Rebecca Horton, a widow of Nelson D. Horton, deceased, and Carlos D. Horton and Mary E. Beard, the children and heirs at law of Nelson D. Horton, and that the property was the homestead of Nelson D. Horton. (2) May 8, 1869, the said Carlos D. Horton and Mary E. Beard gave to Rebecca Horton a life lease of said premises. (3) By sundry and mesne conveyances the title of Carlos D. Horton was conveyed to Frances S. Farrand. (4) May 22, 1884, Frances S. Farrand conveyed the interest acquired from Carlos D. Horton to Etta M. Beard, and upon the same day the same Etta M. Beard gave to B. C. Farrand a mortgage on the entire reversion for \$918.90, to secure the purchase price of the interest conveyed to her; that said mortgage contained a covenant on the part of the mortgagor to pay all taxes assessed upon said premises. (5) Said mortgage was assigned June 16, 1884, to George S. Barrett and by him foreclosed for the interest accrued and unpaid; the sale taking

*See Secs. 1437-1439, Vol. 10, Cyclopedia of Law.

**See Sec. 1439, Vol. 10, Cyclopedia of Law.

place February 27, 1886, and a sheriff's deed being made to George S. Barrett. Redemption expired. (6) May 7, 1887, the said George S. Barrett conveyed, by ordinary quitclaim, the said premises to B. C. Farrand and W. L. Jenks, and on the 18th day of September, 1889, the said Barrett executed in person a conveyance by quitclaim, in usual form, of the said premises to the same grantees, and the same Farrand conveyed by ordinary warranty deed, except as against existing tax claims and mortgages, his interest in the said premises to Sheldon A. Wood, on September 23, 1889, and after the filing of the original bill in this case the said Sheldon A. Wood conveyed, without covenants, his interest in the said premises to complainant. (7) September 20, 1886, the said George S. Barrett redeemed the said premises from the sale made for unpaid taxes of 1882 and 1883, paying therefor, for the taxes of 1882, the sum of \$84.90, and, for the taxes of 1883, \$71.14. (8) September 27, 1887, the said B. C. Farrand and W. L. Jenks redeemed for the taxes of 1884, paying therefor \$62.94; September 25, 1888, the said parties redeemed for the taxes of 1885, paying therefor \$68.70; September 27, 1889, the said Jenks and Wood redeemed for the taxes of 1886, paying therefor \$71.56; and all the rights of said Barrett for taxes paid were transferred to said Farrand and Jenks and the rights of said Farrand and Jenks transferred to Jenks and Wood, and the rights of said Wood transferred to said complainant by assignment. (9) At the time of filing the original bill there were the ordinary city, State and county taxes assessed upon said premises for the years of 1887, 1888, and 1889, in all amounting to upwards of \$161, unpaid. (10) Said Rebecca Horton has occupied a portion of the premises continuously since the lifelease given to her in May, 1869, and has not paid any taxes assessed thereon, beginning with the year 1882. (11) From September 1, 1885, to January 20, 1890, Etta M. Beard and her family occupied the property described in the bill as a home; Mrs. Horton also living there during the same time. The court entered a decree that the complainant had a lien upon the life estate of the defendant for the taxes of 1882 to 1886, inclusive, which had been paid by the complainant and his assignors, and for the unpaid taxes of 1887, 1888, 1889: that she pay the amount of such taxes

within 60 days after service upon her of a certified copy of the decree, and that, in default thereof, her interest be sold by the sheriff of the county, in the manner provided for the sale of real estate on execution for the taxes to and including the year 1886; and that, in default of the payment of the taxes for the subsequent years above named, a receiver be appointed to receive the rents and profits of the premises for the purpose of paying such taxes.

GRANT, J. (after stating the facts). Defendant's counsel insist (1) that complainant has no lien or right of action for the taxes prior to and including 1886; that (2) under our system of taxation complainant is not entitled to a receiver for the unpaid taxes.

1. *It is conceded that the law imposes upon a life tenant the duty to pay the taxes assessed upon the land.* It is insisted, however, that the personal covenant of the reversioner in the mortgage to Frances S. Farrand to pay the taxes, and the joint occupancy of the premises by the defendant and her daughter, the reversioner, operated to relieve the defendant from the payment thereof. The defendant, however, was a stranger to the agreement between the reversioner and B. C. Farrand. The fact that a reversioner mortgages his reversion, and in the mortgage agrees with the mortgagee to pay the taxes, is not of itself a release of that duty on the part of the life tenant. Had there been a contract between the defendant and her daughter by which the daughter had agreed to pay the taxes, a different question would have been presented, which we are not now called upon to determine. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life tenant. The agreed facts contain nothing showing any intention or agreement to release defendant from this duty to pay the taxes. The decree, therefore, covering the taxes which the complainant and his assignors have paid, is affirmed.

2. In New York the practice of appointing receivers in similar cases prevails (*Cairns v. Chabert*, 3 Edw. Ch. 312; *Sidenberg v. Ely*, 90 N. Y. 257); but under our method of enforcing the collection of unpaid taxes upon real estate, and under our system of foreclosing liens, we do not think the appointment of

receivers the proper remedy. When it is determined by adjudication that defendant is under obligation to pay the taxes, it is quite probable that she will do so. The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases. In this respect the decree will be modified. The taxes, however, for the years named are past due, and, if not paid within 60 days after service upon the defendant of a certified copy of this decree, the complainant may pay them, and include the amount thereof in the sale ordered by this decree. The complainant will recover costs of court below, and the defendant costs of this court. The other justices concurred.

DUNCOMBE v. FELT.

81 Mich. 332; 45 N. W. 1004.

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises. The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres, subject to a life-estate in the defendant. That the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt. That said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife. That at about the time of conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record. The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased. That upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states: "Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to

be cut, and is cutting, lumbering, and removing from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber. Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the value thereof. Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the amount of at least five hundred dollars. And your orator further shows that said cutting and removing said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt to do so. All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator." The lease set out in the bill of complaint as executed before the complainant derived his title under the sheriff's deed, and contains the following clause: "To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party, and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." A general demurrer was filed, and on the hearing of the court below

was overruled, and decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there is only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction. The rights of the parties must be determined by the construction given to these clauses in the lease above granted. The title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises "for and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying nothing." The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause which it is claimed gives the defendant the right to take the timber in question. "And it is expressly understood that the second parties are to have as full and complete control of said premises, while they are or either of them shall live, as though such conveyance had not been made." The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases without impeachment for waste.

Counsel for defendant insists that the doctrine laid down in *Stevens v. Rose*, 69 Mich. 260; 37 N. W. Rep. 205, fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for waste. His claim is not sustained by that case. It was there

held that the words "to have and to hold, and to use and control as the lessee thinks proper for his benefit during his natural life," clearly import a lease without impeaching for waste, and that the defendant had the right to do all those acts which such a tenant may exercise, but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there is only 9 acres of timber on the whole 160-acre tract, and that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause "without impeachment for waste" never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste. 10 Bac. Abr., p. 468, tit. "Waste." In *Packington v. Packington*, decided in 1744, and cited by Bacon (reported 3 Atk. 215), the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord Hardwicke granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf in his *Cruise on Real Property* (volume 1, p. 129), lays down the rule thus: "The clause without impeachment of waste, is, however, so far restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate which is called 'equitable waste,' for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done." In 10 Bac. Abr. tit. "Waste," p. 469, it is said: "So, where a lease was made by a bishop for twenty-one years without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees until about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this

court will model the exercise of that power," citing *Abraham v. Bubb*, Freem. Ch. 53. At the common law no prohibition against waste lay against the lessee for life or years deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law, but the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease "without impeachment of waste" had the effect of transferring to the lessee the property of the timber. *Bowles' Case*, 11 Coke, 79; Co. Litt. 220a. The modern remedy in chancery by injunction is broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. 4 Kent. Comm. 13th ed.) 78; *Perrot v. Perrot*, 3 Atk. 94; *Aston v. Aston*, 1 Ves. Sr. 264; *Vane v. Barnard*, 2 Vern. 738; *Kane v. Vanderburgh*, 1 Johns. Ch. 11. In the case of *Kane v. Vanderburgh*, *supra*, it was said: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." In this State an action on the case for waste is authorized by chapter 271, How. St. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the Statute of Gloucester, as he now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages; and this harsh rule was adopted by many of the American States by the early statutes. This statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may take the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings to destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter;

neither can he be permitted to entirely strip the land of all timber, and convert into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life-tenant is selling for his own gain and profit. The demurrer was properly overruled. The decree of the court below will be AFFIRMED, with costs. The other justices concurred.

RICHARDSON v. YORK.

14 Me. 216.

Isaac York conveyed lands to his son Joseph with the following reservation in the deed: "Reserving to myself the use and control of the above-described lands during my natural life. Joseph York afterward sold the lands to the plaintiff, and Isaac York remaining in possession cut a large quantity of timber and was taking it to the banks of the Saco River, intending to appropriate the proceeds to his own support, when the plaintiff replevied the timber on the ground that the life-tenant had no interest or title to the timber.

EMERY, J. The great question in this case is whether the logs replevied are the property of the plaintiff, so as to draw to him the right of maintaining the action. For it is certain, he could not rightfully have entered to cut them himself without the assent of Isaac York, one of the defendants.

In the language of Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 183, at p. 198, it is stated, as common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate, to commit waste, he is so far a tenant without impeachment of waste. Such a permission vests the property of what is the subject of waste, in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals.

From the statement of facts we learn that the land con-

veyed by Isaac York to Joseph York, on which the trees were cut, consisted of about thirty-five acres, from fifteen to twenty acres of which is partially wooded, the residue consists of mowing and pasture, about five acres of that mowing is interval and of a good quality; and the income of the land is insufficient for the support of said Isaac; and that said Isaac has not sufficient income from every source for his comfortable support; that he intended to apply the proceeds of the sale of the logs to his own support, and that if so applied, it would not have been more than a comfortable provision thereunto; that the house occupied by said Isaac was, and is, greatly out of repair, as well as the fences; that the said Isaac is very poor, nearly eighty years of age, and very decrepit.

In no part of the statement of facts, or in the deeds, is it made known whether this was an arrangement made by father and son for the support and maintenance of the father, though it is strongly to be suspected.

The deed of Isaac York, dated the 14th October, 1831, conveys to Joseph York "the northwest half of the homestead farm, whereon I now live, reserving to myself the use and control of the above-described lands, during my natural life." The deed of Joseph York to the plaintiff, dated 24th November, 1834, for \$175, sells and conveys to him all the pine trees and hemlock trees standing, growing, and being on the northwest half of the homestead farm on which Isaac York, now of Standish, in the county of Cumberland, lives, with license to go on and cut and carry away the same; the said northwest half, being the same land described in a deed of Isaac York to Joseph York, dated October 14, 1831, reserving so much of said trees and timber for the benefit of Isaac York, who has a life estate in the premises, as shall be necessary, convenient, and indispensable to the enjoyment of the premises aforesaid during his lifetime, the quantity reserved and to be left as aforesaid, to be ascertained and designated by Isaac Spring.

In *Paget's Case*, 5 Coke's Rep. 77, it was resolved that when trees are cut down by tenant for life, the property thereof belongeth to him in remainder in fee.

Afterward, and contrary to the adjudication in *Herlaken-den's Case*, 4 Coke's Rep. 62, it was adjudged by all the Judges

in the King's Bench, 11 Coke's Rep. 79, in Lewis Bowles' Case, which was trover and conversion, that the lessee without impeachment of waste shall have trees which he cuts, for without impeachment of waste, is as much as without demand for waste done; otherwise, it is, if it be without impeachment, etc., by writ of waste. It was also resolved, that if trees are blown down with the wind, the lessee, without impeachment of waste, shall have them.

After this determination, it was a necessary consequence, that in general, unless on particular circumstances, the lessee for life, without impeachment of waste, was not to be restrained in equity.

But it is said that the clause was never extended to allow the destruction of the estate itself, and would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house: *Packington v. Packington*, 3 Atk. 215. In that case the Lord Chancellor declared that the Courts of Equity had in this respect established rules much more restrictive than those of the common law, which gave tenant for life without impeachment of waste, as large a power over the timber, as tenant in fee simple, that timber might be had for public use: 7 Bac. Abr. Waste, 289. It was malicious, extravagant, humorous waste which the Courts of Equity would restrain.

The parties here have disregarded the provision of our own statute, passed February 28, 1821, ch. 34, which provides, "that any person seized of a freehold estate or of a remainder or reversion in fee simple or fee tail in a lot of woodland or timberland in this State, whereon the trees shall have come to an age and growth fit to be cut, may petition to this Court to have them felled and sold, and the proceeds invested for the use of those interested in such woodlands."

It is not to be questioned, that conformably to the strict construction adopted in Massachusetts, that for a tenant in dower to cut timber for sale would be waste, and produce a forfeiture of the place wasted. And so in this State.

But upon the deeds and facts agreed is the defendant, Isaac York, to be subjected to the unmitigated consequences of his acts, as if he was a mere tenant for life without any excuse.

Almost the whole of the cases have arisen under leases, or devises, etc. Here he was original owner, conveying the land in fee, reserving to himself the use and control of the lands during his natural life. It may well be doubted whether this alone would protect him though the terms are very broad. But though the second deed, under which the plaintiff claims, as purchaser of the trees, might seem to extend to defendant a greater latitude, yet the terms use and control of the land, do not necessarily include destruction of the timber.

In *Davis v. Uphill*, 1 Swanston, 129, an estate had been limited to Ann Uphill for life, remainder to her children, by her deceased husband, as she should appoint; in default of that appointment, to the children in common. They agreed with her, that on her joining in a recovery, the first use should be to her for life, without impeachment of waste. Some difficulty occurred in the conveyance. She commenced cutting, and an injunction was obtained. But the Court refused to continue it to restrain her from cutting timber, unless security was given to her for the full value of all she might cut in her lifetime. This was in 1818.

The expressions in the deed of Joseph York to the plaintiff, reserving so much of said trees and timber for the benefit of Isaac York as shall be necessary, convenient, and indispensable to the enjoyment of the premises during his natural life, might possibly have misled the defendants to a supposition that they were equivalent to the expressions without impeachment of waste. But besides this, they may have supposed that the plaintiff has no exclusive property in the trees and timber, till what should be left was ascertained and designated by Isaac Spring.

It does not appear but what the trees cut were of suitable growth, and fit to be cut. See 8 Term Rep. 145, *Martin v. Knowlys*. It is not stated that they were intended to be applied to the repairs of the fences or buildings, but the poverty and age of the defendant shows that the supply would be *convenient*, if not necessary for his enjoyment of the premises.

In Virginia it is held by Roane, J., *Findley v. Smith*, 6 Hunf. 134, that in considering waste in this country, the common law, by which it is regulated, adapts itself in this, as in

other cases, to the varied situations and circumstances of the country. That cannot be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land in such circumstances, would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. Here the widow is not dowable of wild lands, and so is not put in temptation to fell the trees.

In the case under consideration, it is not among the facts agreed that what was done was to the prejudice of the plaintiff's inheritance. *The whole is left on the allegation of a cutting of pine and hemlock timber.*

We must gather the intention of the parties from their deeds, as well as we can on the words in the deed. And though we may conjecture that the grantor, Isaac, intended not to be limited by the terms *use and control* to anything but the employment of the property during his life as he did before; and though this conjecture is strengthened by Joseph's explanation or enlargement in the deed to the plaintiff, and though it does not appear, but there is sufficiency of such timber left for the remainderman, yet upon the facts agreed the plaintiff, according to the rules of law, *upon the severance by the defendants of the pine and hemlock timber from the freehold, became the owner of it.* We may lament the carelessness with which parties have instruments drawn relating to the relative rights of tenant for life and persons in reversion or remainder. But in this case, in the opinion of the Court, the defendant, Isaac York, by his reservation, remained liable to impeachment of waste, and therefore the defendant must be **DEFAULTED**.

HURD v. CUSHING.

7 Pick. 169. 1828.

WILDE, J. The demandant's title, as appears by the facts agreed, is derived from one Thomas Cushing, and through him

from David Thacher and Isaiah Smalley, three undivided fourth parts being derived from Thacher, and the remaining fourth part from Smalley. And as the titles of Thacher and Smalley depend on different principles, they will be considered separately.

It appears that on the 28th of December, 1807, an agreement was made between Thacher and Smalley respecting the erection and use of certain salt-works, then contemplated to be built, and which are now standing on the demanded premises. By the terms of this agreement Thacher was to furnish the materials for the salt-works, and Smalley was to furnish the land upon which they were to be erected. In pursuance of this agreement Smalley afterward procured a lease of a tract of land, including the demanded premises, from one Ricketson the owner, by which the same was granted and demised to him for an indefinite period of time, and so long as the salt-works then intended to be erected should continue to be used. By virtue of this lease the legal estate was vested in Smalley during his life, determinable by his ceasing to occupy the salt-works. On the 8th of April, 1817, Smalley conveyed an undivided fourth part of the demanded premises to Thomas Cushing. This was intended as a mortgage or security, and a bond of defeasance was given by Cushing to Smalley, but as this bond was not registered, and as the demandant had no knowledge of it when he extended his execution on the premises as the estate of Cushing, it is very clear, we think, that his title cannot be affected by that bond. The demandant therefore acquired by the levy of his execution against Cushing all the original title of Smalley to an undivided fourth part of the premises; and as to this part he would be clearly entitled to recover, but for the death of Smalley. By his death the estate of the demandant was determined, and his right of action destroyed. And this fact may be pleaded in bar of the action, or may be given in evidence on the general issue, if the parties so agree; and it being thus agreed in this case, it is clear that the demandant's title derived from Smalley can no longer be maintained: *Jackson on Real Actions*, 168.

The same objection would apply to the title derived from Thacher, if he and Smalley were seised in common, as the

demandant contends they were, by virtue of their agreement, and by the erection of the salt-works. We are, however, of opinion that Thatcher had no legal title to the land; and that, therefore, it is immaterial whether the salt-works are fixtures or not. The legal estate was clearly in Smalley; and if the works were fixtures, they passed with the land, and if they were personal property, the demandant acquired no title to them by the levy of his execution. All the right or interest which Thatcher had in the land was a parol license to enter for the purpose of repairing and using the salt-works; but this is not such a title as would enable him or his assigns to maintain a writ of entry. He was never seised, and therefore could not be disseised.

Nor can the demandant recover on his title by disseisin, or by estoppel.

True it is that Cushing, by virtue of the levy of his execution against Thatcher, became actually seised by disseisin, and this title passed to the demandant under the levy of his execution against Cushing. But this was a wrongful seisin, and was defeated or determined by the entry of Smalley. He entered in 1823, and since that time he and one Nathaniel Cushing, and their representatives (the tenants being administrators of Nathaniel Cushing), have occupied the premises; so that it is clear that the demandant cannot now recover on a title by disseisin.

Nor can he recover on a title by estoppel. Smalley and Ricketson were strangers and not parties to the proceedings between Thomas Cushing and David Thatcher. They acted merely as appraisers, and had no right to object to the form of the proceedings. And besides, they might have been, and probably were, ignorant of their legal rights; and they were not bound to inform themselves as to the irregularity of the proceedings. As to the deed from Smalley to Cushing, his right only passed by it, and not a fee by disseisin. The words of the grant are, "all my right, title, and interest, in and to one undivided fourth part," etc. It is true that the language of the covenants is more extensive; but this will not enlarge the words of the grant so as to work a constructive disseisin of the land.

Upon the whole, therefore, we are of opinion that the demandant is not entitled to recover, and according to the agreement of the parties he is to be non-suited.

JUDGMENT FOR TENANTS FOR COSTS.

WHITE v. CUTLER.

17 Pick. 248. 1835.

SHAW, C. J., delivered the opinion of the Court. The question in the present case, is whether a tenant in dower or her lessee has a right to cut wood upon the dower estate, for sale, to be removed and not used or consumed upon, or in connection with the estate.

We think that a reference to a few principles, which have been adopted and acted upon in decided cases, in our own State, will lead to a satisfactory decision of this question.

It was in effect decided in *Sargent v. Towne*, 10 Mass. R. 307, that a tenant for life has no right to cut growing trees, that such cutting would be waste, and that wild and uncultivated land cannot be deemed estate yielding annual rents or profits.

In the case of *Conner v. Shepherd*, 15 Mass. R. 164, it was decided that in this Commonwealth a widow is not entitled to dower in wild and uncultivated lands, held separately and distinct from houses, cultivated lands and other improved estate, first, because they yield no annual profit, and secondly, because the widow could not make the only beneficial use of them, of which they are capable, without committing waste and forfeiting the estate. These reasons apply as well to the case of a wood lot situated in the midst of a cultivated country, as to forest lands in their original state. But the Chief Justice, in delivering the opinion of the Court in this case, takes care in terms to limit its operation to the case of woodlands not used or connected with a cultivated farm, or other improved estate.

In the case of *Webb v. Townsend*, 1 Pick. 21, the general rule, that a widow is not dowerable of wild lands, is confirmed,

and it was placed more distinctly upon the ground that as a widow is to be endowed, not according to the value of the land, but according to the value of the annual rents and profits, and as uncultivated lands yield no rents and profits, dower therein would be nugatory and of no value.

But in a subsequent case, *White v. Willis*, 7 Pick. 143, it was held that a lot of wild land, which had been used by the husband in connection with his house and cultivated land, to supply wood for buildings, fences, and fuel, might be properly assigned to a widow as part of her dower, to enable her to take fuel and timber for repairs. It was also suggested, that a widow would have no right to take firebote, etc., from lands of her deceased husband, unless the land, from which it is taken, were included in those assigned as her dower.

A distinction was urged in the argument, between woodlands, kept by the owners to raise wood for sale, for purposes of profit, and wild lands, and that it would be hard to deprive a widow of her dower in such lands, of which the raising of wood for sale may be considered as the most profitable use. But we think the answer results from the legal principles on which the foregoing cases are settled. Such estate yields no annual profit. The owner may make a profit of the land, but it is in the exercise of the rights of a tenant in fee, which a tenant for life, by law, does not enjoy, that of felling growing trees. The result we think is that a widow is not to be endowed of a lot of growing wood and timber, although kept purposely to raise wood and timber as objects of profit, provided that it is not assigned to her as part of her dower, in connection with buildings or cultivated lands. But when woodland is so connected and used, it may be included in the assignment of dower, to be used and enjoyed by the widow, or those holding under her.

But the right of the widow thus acquired is that of reasonable estovers, under which may be included firebote or the necessary fuel for the supply of the dower estate. But this right of reasonable estovers is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used and consumed upon the estate, or for purposes connected with its proper use, occupation, and en-

joyment. It has been recently decided that cutting growing trees, to be exchanged for other wood to be used as fuel or timber on the estate, was not within the right of a tenant in dower, but in law was deemed waste: *Padelford v. Padelford*, 7 Pick. 152.

A fortiori, the cutting of wood for sale, the proceeds of which are not to be used or appropriated upon the estate or in connection with it, is not admissible, under the limited right of taking reasonable estovers.

If the plaintiff, as lessee of the tenant in dower, had no right to cut the growing wood, the defendant, as having the next estate of inheritance, had a right to take the wood when severed: *Blaker v. Anscombe*, 4 Bos. & Pul. 25.

PLAINTIFF NON-SUIT.

REIFF v. REIFF.

64 Pa. St. 134. 1870.

READ, J. The plaintiffs in error were the lessees of a farm of 152 acres, from their mother, a widow, who had a life estate in it under the will of her husband, their father. They were annual lessees from the 1st April, 1866, 1867, and 1868, the widow dying on the 15th June, 1868. At the time of her death, there was standing uncut on the premises, a quantity of mixed timothy and clover grass, a quantity of grass, part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass *emblements*, belonging to the tenants of the deceased owner of the life estate. The vegetable chattels called *emblements* are the corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry and thence are called *fructus industriales*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements: because as it is said the improvement is not distinguishable from what is natural products, although it may be increased by cultivation: 1 Williams on Executors, 670, 672.

The learned Judge in the Court below is a practical farmer,

thoroughly acquainted with the established usages of our State, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator.

JUDGMENT AFFIRMED.

CHAPTER III. OF AN ESTATE TAIL.*

*Meaning, Early History and Construction of an Estate Tail.***

LEHNDORF v. COPE.

122 Ill. 317.

SHOFF, J. It is contended by appellee that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehn-dorf, and her heirs by her present husband, Henry Lehn-dorf," Mrs. Lehn-dorf took a fee-simple estate in the lands conveyed; while appellants contend that she thereby took a life-estate only, with remainder in fee to her children by said Henry Lehn-dorf. The deed, being statutory in form, contains no *habendum* limiting or defining the estate taken by Mrs. Lehn-dorf; and although the deed must be held equivalent to one containing full covenants (Elder v. Derby, 98 Ill. 228), it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they may be. If Mrs. Lehn-dorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life-estate, and the remainder in fee to whoever would take upon determination of her estate. Therefore, as said by counsel for appellees, the determination of the question depends upon a construction of the granting clause of the deed, which is that the grantors, in consideration, etc., "*convey and warrant to Maria Anna Lehn-dorf, and her heirs by her present husband, Henry Lehn-dorf, of,*" etc., the lands in controversy.

The legitimate purpose of all construction of a contract or

*See Secs. 1440-1445, Vol. 10, Cyclopædia of Law.

**See Sec. 1440 et seq., Vol. 10, Cyclopædia of Law.

other instrument in writing is to ascertain the intention of the party or parties in making the same; and, when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. *The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed; but it is the intention apparent and manifest in the instrument, construing each clause, word, and term involved in the construction according to its legal import, and giving to each, thus construed, its legal effect.* 3 Washb. Real Prop. 404; Bond v. Fay, 12 Allen, 88; Lippett v. Kelley, 46 Vt. 516; Price v. Sisson, 13 N. J. Eq. 169, 178; Caldwell v. Fulton, 31 Pa. St. 489; Wager v. Wager, 1 Serg. & R. 374. It cannot be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first notice the contention of counsel for appellee that, by virtue of section 13 of the conveyance act (as there is here no express limitation upon the estate of Mrs. Lehn-dorf, and as no one can have heirs while living), the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows: "Sec. 13. Every estate in lands which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." It is not necessary, as seems to be supposed, that, to create a less estate than

the fee, there should be express words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear by necessary implication that a less estate was granted.

In an early case (*Frogmorton v. Wharrey*, 2 W. Bl. 728), where there was a surrender of copyholds by R., who was seised in fee, to M., his then intended wife, and the heirs of their two bodies, etc., Wilmot, C. J., delivering the opinion of the court for himself, Bathurst, Gould, and Blackstone, JJ., after holding on authority of *Gossage v. Tayler*, Style, 325, and *Lane v. Pannell*, 1 Rolle, 438, that the children thus begotten took as purchasers, and not as heirs, says the only difference in the cases is that in those cases "the wife had an express estate for life, and here not. But upon legal principle the cases are just alike. An estate 'to A. and the heirs of his body,' is the same as an estate 'to A. for life, remainder to the heirs of his body.' " By operation of law, the added words created, in the case cited in M. a life-estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A. and the heirs of his body," by operation of law, creates an estate-tail in A.; remainder in tail. And this has been the uniform holding. The sixth section of the conveyance act provides that in cases where, by the common law, any person or persons might, after its passage, become seised in fee-tail of any lands, etc., by virtue of any gift, devise, grant, or conveyance "hereafter to be made," or by any other means whatsoever, such person 'or persons, instead of being or becoming seised thereof in fee-tail, shall be deemed and adjudged to be and become seised thereof for his natural life only, and the remainder shall pass, in fee-simple absolute, to the person or persons to whom the estate-tail would on the death of the first grantee or donee, pass according to the course of the common law, by virtue of such gift, devise, or conveyance.

It is apparent if, at common law, by virtue of this conveyance, Mrs. Lehndorf would take an estate-tail, whether an estate-tail general or an estate-tail special, the thirteenth section would be inoperative, and by virtue of section 6 she would become seised of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estates-tail came into general use upon construction by the courts of the statute *de donis conditionalibus* (13 Edw. I. c. 1); and, while no extended discussion will be necessary, an examination sufficient to determine if this case falls within the rules creating an estate-tail will be proper. To create an estate in fee-simple at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation in the regular course of descent. A tenant in fee-simple is defined by Blackstone to be "he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely, simply; without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law." 2 Bl. Comm. 104. Estates in fee-tail were of two kinds: Estates-tail general, as where the grant was to one, and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni*; and estates-tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. 2 Bl. Comm. 113, 114; 4 Kent Comm. 11; 1 Washb. Real Prop. *66. In a grant of lands, words of inheritance were necessary at common law to the creation of a fee; but in the creation of a fee-tail estate more was required. There must also be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A." But there was no special efficiency in these particular forms of words, and it was requisite only that, in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. 2 Bl. Comm. 114; 1 Washb. Real Prop. *72; 2 Prest. Est. 478, and cases cited; 2 Jarm. Wills, 325.

The necessary words of inheritance are not here wanting to create a fee-simple or a fee-tail at common law. The grant is to Mrs. Lehdorf and her heirs, and, if the description had stopped here, a fee-simple estate would at common law have passed by the deed. The grant is not, however, to her and her heirs simpliciter, but to her and her heirs by a particular husband,

and by necessary implication excludes the construction that heirs generally were intended. Heirs generally would include, not only those designated, but children she may have, or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so that it would have read "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that the equivalent words, which by necessary implication describe and designate the particular body out of which the heirs should proceed, would suffice to create an estate-tail at common law, which seems to be done by the cases and text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband" could be no other than the issue of her body by him begotten; no other person or class of persons would answer the description, and they would and do fill it in every particular.

This precise point was ruled in *Wright v. Vernon*, 1 Drew. 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Sanwell by a particular wife forever,' is precisely the same as that of a limitation to the heirs of his body by that particular wife forever. The words 'of his body' are not in the least degree necessary to this construction of the term 'heirs' or 'right heirs,' because, without their insertion, the full and absolute effect of them is involved in the description, 'his right heirs by Mary, his second wife;' which description limits the meaning of the term 'heirs' to heirs special, procreated by himself, as effectually and as necessarily as the words 'of his body,' could do if they had been added." This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows that Mrs. Lehndorf would, at common law, be seised, by virtue of this conveyance, of an estate-tail special in the lands conveyed, and therefore, under the statute, would take

an estate for her life only; and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband *in esse* at the time of making the deed,—subject, possibly, however, to be opened to let in after-born children of the same class. If no issue of her body “by her present husband” had been then living, the remainder would have fallen under Fearne’s fourth and Blackstone’s first definition of a contingent remainder; *i. e.*, when the remainder is limited “to a dubious and uncertain person.” But here, at least two of the children who would, under the statute, take the fee-simple estate upon the termination of the life-estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the possible contingency of being divested *pro tanto*, if opened to let in after-born children answering the same description. The person to whom the remainder is limited is ascertained; the event upon which it is to take effect is certain to happen; and, although it may be defeated by the death of such person before the determination of the particular estate, it is a vested remainder. “It is the uncertainty of the *right* of enjoyment which renders a remainder contingent; not the uncertainty of its actual enjoyment.” Bl. Comm. i i, 169; Fearne Rem. 149; 4 Kent Comm. 203; Hawley v. James, 5 Paige, 467; Williamson v. Field, 2 Sandf. Ch. 533; Moore v. Lyons, 15 Wend. 144.

But it is said that the rule in Shelley’s Case should be applied; but it will be seen that its application will produce the same result. That rule, as formulated by Jarman in his work on Wills, p. 331, will best illustrate the position here. It is: “The rule simply is: that where an estate of freehold is limited to a person and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word ‘heirs’ is a word of limitation, *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple.” The rule operates upon the words of inheritance without affecting the words of procreation; so that if in any case the words “heirs of his body” or other equivalent sufficient to create an estate-tail, are used, a fee-tail is vested in the first taker, and not the fee-simple, as seems to

be supposed. Therefore, if the rule be applied, Mrs. Lehnendorf would at common law be seised of an estate in fee-tail, and brought directly within the terms of section 6 of the conveyance act before cited. When, therefore, Mrs. Lehnendorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee; and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.

But it is said this mortgage was given for the purchase money of the land, and that in some way, not clearly defined in argument, a lien therefor exists upon the estate conveyed. If it is intended thereby to insist that a vendor's lien exists, the answer to such a contention would be threefold. A vendor's lien upon real estate is a creation of the courts of equity, upon the equitable consideration that where the vendor has taken no security for the purchase money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with it, and the other acquire, the title, without payment of the purchase price of the land. It exists, if at all, independent of any contract—is personal to the vendor; and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abandoned it as security, it will be held to be waived. *Pom. Eq. Jur.*; *Cowl v. Varnum*, 37 Ill. 184; *Richards v. Leaming*, 27 Ill. 432. Thus taking an independent security will discharge the lien. *Conover v. Warren*, 1 Gilman, 498.

It is manifest that when the deed and mortgage back to secure the purchase money are parts of a single transaction, as in this case, that one estate may be conveyed by the deed, and a wholly different interest conveyed by the mortgage; as if the fee be granted by the deed, and an estate for life or for years mortgaged. The power of the parties to so contract cannot be questioned. If the vendor saw proper to take security by mortgage upon less than the whole land, or upon less than the estate conveyed, for the unpaid purchase money, there is no reason why it would not be a valid contract, and the residue of the land or estate pass by the deed unincumbered by any lien in his favor. But the bill in this case is for the foreclosure of the mortgage given to secure the purchase money, and proceeds upon the the-

ory that in equity the mortgage attached to and became a lien upon the fee, which is alleged to be in Mrs. Lehdorf, and is to enforce the security under the contract—a theory wholly inconsistent with the preservation of the vendor's lien.

Again, as before said, the lien created by implication in favor of the vendor is personal to him, and is not assignable or transferable, even by express contract, between the vendor and an assignee. It can be enforced only by the vendor himself. *Richards v. Leaming*, *supra*; *Keith v. Horner*, 32 Ill. 524; *McLaurie v. Thomas*, 39 Ill. 291; *Markoe v. Andras*, 67 Ill. 34; *Moshier v. Meek*, 80 Ill. 79. This is an established rule in equity, and is an insuperable obstacle to the enforcement of a vendor's lien by appellee. Such liens are secret; often productive of gross injustice to others dealing in respect of the property to which they attach; and courts of equity will not extend them beyond the requirements of the settled principles of equity.

But it is said that, the deed and mortgage being part of the same transaction, the title would not vest as against the purchase money; and the principle so often announced by this and other courts, that in such case, there is no interregnum between the effective operation of the deed and mortgage in which judgment liens and the like can attach as against the mortgage security, is sought to be invoked. The doctrine can have no application to the facts of this case. It is true, as so often held, that in the case stated, the making and delivery of the deed and mortgage, being simultaneous and part of one transaction, are to be construed as one act; *eo instante* upon the delivery of the deed the mortgage becomes effective, and the title passes to the mortgagor, subject to the lien of the mortgage. The mortgage attaches to the title conveyed in its transmission from the vendor to the vendee, and obviously, is effective in arresting the passage of the title so far only as it reconveys the estate to the original vendor. Therefore, if, by deed, a life estate is conveyed to one, and the fee to another, and, as part of the same transaction, the life-estate is mortgaged by the grantee thereof to the grantor, the mortgage would attach to the life-estate, and the life-tenant would take subject to the lien, and the fee would pass unaffected by the mortgage.

It is also insisted that the children of Mrs. Lehndorf are mere volunteers, who paid nothing, and therefore, in equity, their interest should be subject to the payment of this purchase money. We know of no recognized principle of equity by which the case can be affected by that consideration. If it be conceded they paid nothing, it is apparent defendant in error has no such equity as should prevail against their title. It is not enough that they are not purchasers for value; the party questioning their title must show himself legally or equitably entitled to the relief. When defendant in error purchased the notes of Humphrey he had notice by the record of the state of the title; and that the mortgagor, in the mortgage given to secure them, had a life estate only in the lands mortgaged. He must be presumed to have known that the mortgage conveyed, subject to the condition of defeasance, the life-estate of Mrs. Lehndorf only; and also that the assignment of the notes, or of the notes and mortgage, could not transfer to him any equitable lien Humphrey might have had upon the fee in the land for the unpaid purchase money. Two thousand dollars of the consideration was paid at the execution and delivery of the deed, but by whom does not appear. If the children paid nothing, it was neither unlawful nor immoral for the parents, or either of them, to provide for the future welfare of their offspring by purchasing this land, and having the fee deeded to them, if done without fraud as to existing creditors, and with the knowledge and consent of their grantor. No fraud is alleged or shown, nor is it shown that the mortgage upon the life-estate of Mrs. Lehndorf was or is inadequate security for the money remaining unpaid to the defendant in error; but, if it was, it could make no difference. As we have seen, it is not purchase money in his hands, in any sense in which a lien can be enforced in equity otherwise than by a foreclosure of the mortgage upon the estate and interest of which Mrs. Lehndorf was seised; that is, her life-estate in these lands.

It appears by the bill that the deed was made to Mrs. Lehndorf, and her heirs by her present husband, etc., at her request. The grantor had full knowledge of the grant, and took back a mortgage to secure the unpaid purchase money, executed by Mrs. Lehndorf and her husband only. Defendant in error purchased the notes with notice of the facts, as disclosed by the record, and,

if he must lose because of the inadequacy of his security, he can not complain.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. REVERSED AND REMANDED.

CHAPTER IV.

OF A FEE SIMPLE ESTATE, AND THE RULE IN SHELLEY'S CASE.*

*Meaning of an Estate in Fee Simple—How Created.***

JACKSON v. VAN ZANDT.

12 Johnson, 169. 1815.

THOMPSON, C. J., delivered the opinion of the Court (SPENCER, J., dissenting). The grounds upon which the plaintiff's counsel rested their argument, to show that the Act of 1782 did not reach their case, were,

1st. That the Act did not operate prospectively.

2d. That it did not give to the tenant in tail, a fee simple absolute, but only operated as a repeal to the statute *de donis*, leaving the estate a conditional fee, as at common law.

With respect to the first objection: it is true, that the Act is not drawn with skill and accuracy; and, according to strict grammatical construction, may be liable to the criticism made by the plaintiff's counsel. But the sense and meaning of the Act, and the intention of the Legislature, cannot be mistaken. It is a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the Legislature to be extracted from the whole; and when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the Legislature be plain: 2 Cranch, 386.

It is a first principle in legislation, that all laws are to operate prospectively. And it appears to me that it would be doing great violence to the intention of the Legislature, to limit this Act to estates tail then existing. This would be comparatively doing

*See Secs. 1446-1453, Vol. 10, Cyclopaedia of Law.

**See Sec. 1446 et seq., Vol. 10, Cyclopaedia of Law.

nothing. It would be obviously against the general scope and object of the statute, which was to abolish entails. It is a settled rule of construction, that when the words of a statute are obscure or doubtful, the intention of the Legislature is to be resorted to in order to find out the meaning of the words. This intention is sometimes to be collected from the cause or necessity of making the statute. And whenever the intention can be discovered, it ought to be followed, with reason and discretion, in the construction although it seems contrary to the letter of the statute: 6 Bac. Ab. 384. If this be a sound rule of interpretation, and of which there can be no doubt, it must apply with great force to the case before us. And, indeed, the intention of the Legislature is so obvious, that it was not pretended to be denied by the plaintiff's counsel in the argument. The Act of 1787, by which the premises in question are given to Richard Penn Hicks, is a strong legislative construction of the Act of 1782. For it was obviously made for the express purpose of carrying into effect the will of Thomas Hicks, according to the intention of the testator. It alleges, by way of recital, that, were it not for the late Acts abolishing entails, Richard Penn Hicks would have become seized in fee tail general of the premises in question. But by such law the estate in fee tail general, devised to Mary Hicks was converted into a fee simple, and she, having been born out of lawful wedlock, could have no heirs, by means whereof the lands escheated to the people. It is no answer to this argument that this is a private Act, and the suggestion made by the party. This is true where the suggestions are matters of fact, but that is not the case here. There was an alleged construction of a public Act, and which the Legislature were bound to look to and adopt or reject, as, in their judgment, the Act would warrant. And if the Act of 1782 did not extend to this case, most certainly the Act of 1787 ought not to have been passed. In my opinion, therefore, the Act of 1782 must have a prospective operation, and apply to the will in question.

Nor is the other ground of argument, in my judgment, better founded. This seems to have been suggested by the difference in the phraseology between the Acts of 1782 and 1786. By the former, the estate in fee tail is converted into a *fee simple*, and by the latter into a *fee simple absolute*. This difference, how-

ever, does not extend throughout the Act, for, in the second section of the Act of 1786, the term *fee simple* is used in the same sense with *fee simple absolute* in the first section. But if it were not so, it would make no difference in the construction of the two statutes. *The terms fee simple and fee simple absolute have one and the same meaning. Littleton (sect. 1.) says, a tenant in fee simple is he who hath lands or tenements to hold to him and his heirs forever; and it is called fee simple, or feodum simplex, because it signifies a lawful and pure inheritance. Coke, in his Commentary, adopts the same definition, and says, that simple is added to fee for the purpose of showing that it is descendable to the heirs generally, without restraint to the heirs of the body, or the like. And he uses the terms, simple and absolute, as synonymous, when subjoined to fee. Thus, says he, the more apt division of a fee is into fee simple or absolute, conditional, and qualified or base. For the word simple properly excludeth both conditions and limitations that defeat or abridge the fee. It would be a very strained construction of the Act of 1782, to say it only converted fee tails into conditional fees, as at common law. The result of the opinion of the Court accordingly is, that the Act of 1782 operated prospectively, and of course extended to the will of Thomas Hicks; that the fee tail general, devised to his sister, Mary Hicks, was by the statute converted into an estate in fee simple. And if so, it is not denied but that the defendant has shown a good title to the premises in question, and is entitled to judgment.*

JUDGMENT FOR THE DEFENDANT.

BUFFUM v. HUTCHINSON.

1 Allen, 58. 1861.

MERRICK, J. This is a real action to recover possession of the tract of land described in the writ, being part of lot No. 6 in the third range which was laid out and assigned by the town of Lynn to Matthew Estes in 1706. The demandants derive their title by a regular series of conveyances from said Matthew Estes; deducing their title, among other conveyances, from deeds from the heirs

of John Ireson and from Amos Dorman. Their title in this manner being shown to be complete, they are entitled to recover unless the objections relied upon by the tenants are sufficient to prevent it.

It is first objected that the demandants are estopped from setting up their title under the conveyance from the heirs of John Ireson, by reason of the covenants contained in a certain deed of partition made and executed by them and certain other persons, proprietors of certain parts of the tract of land known as the "Rocks Pasture." This deed bears date and was executed on the 22d day of November, A. D. 1813. By the terms of it, six acres and eighty poles in the sixth lot in the third range, on the eastern side of the said lot, were set off and assigned to Jacob Ingalls. By the same deed, eight acres and one hundred poles were also set off and assigned to the heirs of John Ireson. Both of the lots thus assigned and set off to Jacob Ingalls and the heirs of John Ireson include the demanded premises. And the several proprietors, parties to the said deed, "do for themselves, their heirs, executors, and administrators covenant and grant to each other that he or they shall thenceforward peaceably and quietly have, hold, possess, and enjoy the same" lots set off and assigned to them severally in and by said deed. "free from all right and claim whatsoever of them or either of them, or any person claiming from or under them, forever." The tenants insist that as the six acres and eighty poles set off and assigned to Jacob Ingalls include the demanded premises, the demandants are estopped, by the covenants of the heirs of John Ireson, from claiming the same under deeds from them. But whatever may have been the right of Jacob Ingalls, derived under the deed of partition, the tenants do not show that they are entitled to the rights thereby acquired by him. The tenants are the heirs-at-law of Jesse Hutchinson, Jr., to whom the demanded premises were conveyed by the warranty deed of Sidney Ingalls. But it does not appear, nor is there anything in the facts reported to show, that there was any connection between him and Jacob Ingalls, or that the title of the latter, whatever it was, ever came to him. On the contrary, the demandants hold under deeds from the heirs of John Ireson, to whom the same demanded premises were, by the deed of parti-

tion, in direct and explicit terms assigned and set off. As against all persons, therefore, except Jacob Ingalls, they had a clear and complete title; and as Sidney Ingalls shows none derived from Jacob Ingalls, neither he, nor the tenants claiming under him, can insist upon an estoppel by force of the covenants in the deed of partition.

But the demandants, in tracing their title from Matthew Estes, hold under a deed from Amos Dorman, as one of the intermediate conveyances. And the tenants claim that they derive title from the deed of Dorman dated January 4, 1847, written on the back of a deed of Sidney Ingalls to Jesse Hutchinson, Jr., of the same date. It does not appear from the facts reported whether this deed of Dorman was made before or after the conveyance by him of the demanded premises under which the demandants derive their title; if it was afterward, it is very clear that Hutchinson could take nothing by it. *But whether it was before or afterward is immaterial to the present issue; because the deed which names no grantee, but which being written on the back of the deed to Jesse Hutchinson, Jr., it is contended must be construed to be a conveyance to him, contains no words of limitation, and therefore conveyed only a life-estate. The word "heirs" is essential in a deed of conveyance to create an estate in fee; and if a man purchase lands to himself forever, or to him and his assigns forever, he takes only an estate for life: Kent Com. 6. The grantee, Jesse Hutchinson, Jr., having deceased, the life-estate which he acquired by the deed of Dorman, if in fact he took anything by it, is at an end; and the tenants therefore cannot avail themselves of the estate thus conveyed.*

The tenants, however, further rely upon a deed of Dorman to Albourne Oliver, conveying a certain undivided part of the land in "Rocks Pasture," in which he excepts, among other lots, "about two-thirds of the sixth lot in the third range of said 'Rocks Pasture,' sold to Jesse Hutchinson." This exception has some tendency to show that he had made a conveyance of some estate to Hutchinson; but as the only conveyance of that kind shown to have been made by him is by deed, and written on the back of the deed of Sidney Ingalls, and as that was the conveyance only of a life-estate, which has been

terminated by the death of the grantee, the tenants obviously can derive no advantage from it.

It follows from these considerations that the exceptions to the rulings of the presiding Judge cannot be sustained, and that the verdict for the demandants is to stand, and judgment is to be entered upon it.

EXCEPTIONS OVERRULED.

CAMPBELL v. CARSON.

12 S. & R. 54. 1825.

DUNCAN, J. The will of George McDowell gives rise to this controversy. The question raised by it is: Whether the testator devised to his wife Frances, his lands in Westmoreland County, in fee, or she only took a life estate? The devise is as follows: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner and form: First, I give and bequeath to Frances McDowell, my dearly beloved wife, whom I likewise make my sole executrix of this, my last will and testament, all and singular my lands, messuages, and tenements in Westmoreland County, to be by her freely possessed and enjoyed." He then bequeaths to her certain specific legacies, and then proceeds: "I also bequeath to my niece, Martha Glyn, a certain tract or piece of land, situate in Westmoreland County aforesaid, containing one hundred acres lying on the east side of the spring on the said land." The testator died without issue. The lands in Westmoreland County were held by settlement right. The testator had been driven from them by the Indians some years before he made his will, and the settlers had not returned. If one traveled out of the four corners of the will, in search of the intention of the testator, it would be inconceivable that he could intend a life estate in a small improvement, without other than cabin buildings, deserted for years, and the cleared land again grown up, on which no purchase-money had been paid, and depending on the will of the Legislature, which might, by not extending the time of payment,

cast the whole burden of it on the tenant for life, or make void the inceptive right. But the case does not require us to make a distinction between such an inceptive title and one consummated by patent. In every case, where a testator devises his land without more, his *prima facie* intention is to give the whole interest. Judges have found themselves constrained, however, to decide that the words, I devise my plantation, my farm, my house, my land, carry only an estate for life: 3 Cranch, 137. But where it appears from the whole will taken together, that the testator intended a fee, if there are any words equivalent to perpetuity, it will be held a fee, and the constant struggle of the Courts has been to seize hold of any word or any provision to effectuate the intention. Where anything is directed to be done, or any intention of the testator to be accomplished, where the words of the devise give only an estate for life, and where such estate would be insufficient to answer the end a fee passes. The implication must be necessary or manifest, and not dubious or merely probable. Where, from the whole context of the will, it appears the testator intended a fee, and the conscience of a Judge so informs him, it is his duty to construe it a fee. I do not mean by this that the words land, plantation, farm, house, *ex vi termini* will do; but any words in the will showing the testator did intend a larger estate than for life, or such larger estate is necessary to answer his declared purpose, to accomplish his views. Every case of this sort depends on its own particular circumstances, and is individual. *In construing a will, though a fee is not given by the devising clause, yet, if there is anything on the face of the will to indicate an intention to give a fee, any words equivalent to words of perpetuity, anything in the four corners of the will from which a fair and demonstrable inference can be drawn of an intention to give a fee, to the disherison of the heir, a fee will pass. Equivalent words do not depend on their technicality, but on their reasonable construction, their plain, natural meaning.* I will instance some cases in which the words have been construed as tantamount: I devise all I shall die possessed of; I devise my part; my share; my interest. So, a devise of land wholly to A: all my worldly substance, or effects, real and personal: all my landed property. It is always a question of construction. If the words denote only a description of the specific

lands devised, and if no words of limitation are added, the devisee has only an estate for life. But if they denote the *quantum* of interest or property the testator had in the lands devised, the whole extent of his interest passes to the devisee. *These very words*—"to be by her freely possessed and enjoyed," have received a judicial construction; for in *Mudge's Lessee v. Blight, Cowp, 352*, a devise thus, "*As touching my worldly estate, I devise the same as follows: to my two sons, T. M. and R. M. whom I make and ordain my sole executors, I give all my lands and tenements freely to be enjoyed and possessed alike,*" passed a tenancy in common, in fee, to T. M. and R. M. The free enjoyment must, as Lord Mansfield says, mean free from all limitations; that is, the absolute property. Subsequent cases in England may have put a different construction on the words, "*freely to be enjoyed;*" as free from impeachment of waste, free from incumbrances; but I am very free to declare that Lord Mansfield's construction is the most natural and reasonable, and that the other is but a remote probability; a possibility that the testator might so have intended them; but in my consideration they mean, the free enjoyment for all purposes against the heir. This is the fair meaning, the natural, common-sense construction; the other is a forced construction, straining the words against their common use and understanding; not to effectuate, but to defeat the testator's intention. They have been construed by this Court according to their usual acceptation, and the understanding of all mankind. In *Willis v. Bueher, 2 Binn. 464*, the Chief Justice puts this construction on them; and again, words not so strong—"I give my plantation to my son John, for him to improve and enjoy the same," were held to pass a fee in *Hoge v. Hoge, 1 Serg. & Rawle, 144*. I have no disposition to recede from the liberal cast of cases which effectuate the intention of the testator; far from it; without a disposition to overturn any settled principle on the construction of limitations in wills, I feel a strong inclination to construe them by a rule of common sense, which is as strong as any case can be. To give to words their natural sense, unless some obvious inconvenience or incongruity would result from such construction, is the cardinal rule in the construction of wills. In addition to the words—"freely to be enjoyed," which I consider words of perpetuity, if the prefatory

clause declaring the testator's intention to devise his whole worldly estate is taken in connection with the devising clause, which is always done where there is a clear intention for the purpose of explaining or enlarging the estate, here there is such an evident intention without anything to disconnect, without any interposing clause, that I must lay hold of it to effectuate the clear intention of the testator to give his wife a fee simple. On this branch of the case, *Winchester's Lessee v. Tilghman*, decided by the Provincial Court of Maryland, and affirmed in the Court of Appeals, 1 Harris & McHenry, 452, in which it was held, that "as to the worldly estate it has pleased God to bless me withal," and after several intervening devises, "I give unto my daughter Eliza three hundred acres of land, lying in Kent and Queen Anne's Counties, called Pharsalia," passed a fee, is very applicable. The conclusion of law is not, where there is a devise of land, a plantation, a house, without more, that because a fee was intended, therefore a fee is devised; but it is quite certain that if the intention to devise a fee is evident and manifest from the general scope of the will, taking into view all the circumstances and clauses in the whole will, and uniting them together, it will be construed a fee, and it is not material what words are used, whether technical or not, the meaning and intention being thus collected from the words or by necessary implication.

JUDGMENT AFFIRMED.

NORTH v. PHILBROOK.

34 Me. 532. 1852.

RICE, J. This is a petition for partition. The rights of the petitioner depend upon the provisions of a deed from Joseph North and Hannah North to Henry W. Fuller, dated January 7, 1814, and a deed from Gershom North to James P. Philbrook dated November 17, 1846.

The original estate was in Joseph North and Hannah North, his wife, in right of the wife. Gershom North was a son of Joseph and Hannah, who also had other children and heirs, and the petitioner is a daughter of Gershom.

Hannah North, one of the grantors to Fuller, died in February, 1819, and Joseph North, the other grantor to Fuller, died April 17, 1825. Ann North, wife of Gershom, deceased before her husband, but after the decease of both Hannah and Joseph. Subsequent to the death of Ann, Gershom married again, and died March 4, 1849, leaving the petitioner, a minor daughter by his second wife, his only heir.

The deed of trust from Joseph and Hannah North to Fuller contain no words of inheritance. The first point raised at the argument was as to the character of the estate which passed to the trustee by that deed. The petitioner contended that it was an estate of inheritance, because nothing short of such an estate would enable the grantee in that deed to perform the trusts provided in the deed, and carry out the manifest intention of the grantors.

As a general rule, such a quantity of estate will be held to be vested in trustees as is required for the performance of the trust; and therefore if land be given to a man, without the word heirs, and a trust be disclosed which can be satisfied in no other way but by the trustee's taking an inheritance, it has been held that a fee passes; so where there is a trust for sale, that is a purpose which it is impossible to serve unless the trustee have an inheritance, "for if they are to sell a fee, they must have a fee:" Crabb on Real Property, § 1831, p. 594. So a trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust: Lewin on Trust and Trustees, 235.

Trustees must in all cases be presumed to take an estate commensurate with the charges imposed on them: 7 East, 99. Therefore, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take a fee. This doctrine is frequently applied to trusts created to support estates of inheritance: 8 Vin. Abr. 262, pl. 18.

When lands are granted to a trustee without words of perpetuity, he will by implication of law take a fee, if such estate be necessary to fulfill the objects of the trust: Welch v. Allen, 21 Wend. 147.

The grant to Fuller not only authorized him to go into the immediate possession of a portion of the estate, but also, to "sell

so much of the above-granted premises and execute a good and sufficient deed thereof, as shall amount to the sum of \$800," for the purpose of building a house, but further stipulated that, "provided the said land shall not have been sold nor the said building erected, during the lifetime of the said Joseph, the said Fuller is hereby authorized, after the decease of the said Joseph, to sell so much of the above-granted premises as shall amount to the above sum and for the purpose aforesaid, out of such part of the premises as he shall think proper."

To comply with these provisions it would seem to be necessary that the trustee should have an estate in fee, and that such was the intention of the grantors is obvious when all the provisions of the deed are taken into consideration.

The estate of the trustee being thus enlarged, by operation of law, its operation upon the rights of other parties must be considered. The grantors reserved to themselves, during their natural lives, the use of the principal part of the estate, remainder over to Gershom and Ann North during their natural lives, and lastly, after the death of Gershom and Ann, so much of the estate as remained unsold "to descend to, and vest in, the heirs of Joseph North and Hannah North, his wife."

At what point of time did the estate vest in the heirs of the grantors? This question was much discussed at the argument, But from the view we take of the case it is wholly immaterial, so far as the rights of the petitioner are involved, how this question is determined, and it is therefore unnecessary at this time to enter upon a discussion of the distinctions which exist between vested and contingent remainders. The rights of other parties, not now before the Court, may be found more involved in the consideration of that branch of the law.

If, as is contended by the respondents, the heirs of Joseph North and Hannah North became known at the death of Joseph, and the remainder then vested in these heirs, with the right of possession of the estate after the decease of Gershom and Ann, then as a legal consequence, Gershom, being one of the heirs of Joseph and Hannah, became seized of a vested remainder in fee which being a transferable interest, passed by his deed, dated November 17, 1846, to Philbrook, leaving no interest to be inherited by his daughter, the petitioner.

If, on the other hand, as is contended by the petitioner, the estate remained contingent until the death of Gershom, and then, according to the terms of the deed of trust, vested in the heirs of Joseph and Hannah, the petitioner is equally excluded. She being the heir of Gershom and not the heir of Joseph and Hannah, and the interest of Gershom according to this construction of the deed being an equitable life estate only.

But it is strenuously contended that the petitioner is the heir of her grandparents, Joseph and Hannah North, and therefore entitled to recover.

In a recent case in Massachusetts, *Brown et al. v. Lawrence et al.*, 3 Cushing, 396, which in all material points is strictly analogous to the case at bar, this question was distinctly before the Court, and directly decided. The action in that case was brought by grandchildren of the grantor, claiming as heirs of the grantor after the termination of an intervening life estate in their father, who during his life, had aliened his interest in the estate.

In giving the opinion of the Court, SHAW, C. J., says: "They cannot make themselves heirs of the grandfather, because their father, through whom they must claim, was living at the time of their grandfather's decease; and it is only when a son or daughter dies before the father, leaving children, that such children are heirs of a grandfather, or other more remote ancestor. These children were not born when the testator died; their father was then his heir, and became a new stock of inheritance to these demandants. If the estate vested in him, he had a capacity to alienate it, and did alienate it, by his deed to the city; if the estate did not vest in him, then nothing came to these demandants, as his heirs."

The Court are unable to perceive any principle upon which the petitioner can recover, and according to the agreement of the parties a *non-suit* must be entered.

*The Rule in Shelley's Case, Its Origin and Effect.**

HARDAGE v. STROOPE.

58 Ark. 303. 1893.

BATTLE, J. J. L. Stoope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stoope and wife, but they died in her lifetime. She died leaving no heirs of her body, but left her father, W. S. Stoope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stoope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor

*See Sec. 1477 et seq., Vol. 10, Cyclopaedia of Law.

granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the *habendum*, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in Shelley's Case obtain in this State? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this State?

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States of the Constitution and laws of this State, shall be the rule of decision in this State unless altered or repealed by the General Assembly of this State."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid down

in Shelley's Case in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir William Blackstone in his opinion in Perrin v. Blake, 1 W. Bl. 672 cites a case in 18 Edw. II as establishing the same rule. The earliest intelligible case on the subject, however, is that the Provost of Beverly, 3 Y. B. 9, which arose in the reign of Edward III, and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the rule. Chancellor Kent, upon this subject, says: "The Judges in Perrin v. Blake, *supra*, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner, and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendable from him to the regular line of descent. Mr. Justice Blackstone, in his argument in the Exchequer Chamber in Perrin v. Blake, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in Shelley's Case, com-

siders the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase—an amphibious species of inheritance—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In *Dos v. Laming*, 2 Burrows, 1100, Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts.

But, whatever may have been the cause of its origin, its effect has been “to facilitate the alienation” of land “by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease.” Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every State where it has not been repealed by statute: *Starnes v. Hill* (N. C.) 16 S. E. 1011; *Baker v. Scott*, 62 Ill. 88; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Doebler’s Appeal*, 64 Pa. St. 9; *Kleppner v. Laverty*, 70 Pa. St. 72; *Polk v. Faris*, 9 Yerg. 209; *Crockett v. Robinson*, 46 N. H. 454; 4 Kent Comm. marg. pp. 229-233; 2 Washb. Real Prop. (5th ed.) pp. 655-657.

The rule has never been changed in this State except in one respect—estates tail have been abolished. Section 643 of Mans-

field's Digest provides that, whenever any one would become seized at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant, or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant, or conveyance." To this extent it has been repealed; in other respects it remains in full force in this State; and it was so held in *Patty v. Goolsby*, 51 Ark. 71, 9 S. W. 846.

2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs . . . (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, . . . " according to the rule in *Shelley's Case*, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object—the groundwork of the grantor's or testator's bounty"—and upon the presumption, arising from the fact that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs . . . of the ancestor, and be entitled only in respect of such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase," and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor: 2 *Fearne, Rem.*, pp. 216-220.

"Hargrave has justly observed," says Fearn on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import—has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus by reference to whom the succession is to be regulated—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation—a means of accomplishing that intention to comprise, by the use of the word 'heirs' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and to his heirs, general or special:" 2 Fearn, Rem., p. 221.

In Doeblor's Appeal, 64 Pa. St. 9, Judge Sharswood, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take *qua heirs*, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage—has passed away; it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs, *qua heirs*, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declar-

ation, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor Kent, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers:" 4 Kent Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this State the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll, and she became seized of the land in fee simple: 2 Washb. Real Prop. (5th ed.) p. 653.

"As a consequence from the foregoing principles, whoever

has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs:" 2 Washb. Real Prop. 651.

It follows then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the Court below is REVERSED, and the cause is remanded for proceedings consistent with this opinion.

CHAPTER V. OF REVERSIONS AND REMAINDERS.*

*Meaning of a Reversion.***

BURDEN v. THAYER.

3 Met. (Mass.) 76. 1841.

SHAW, C. J. Upon the case stated, it appears that in 1833, William Capron, being owner of the estate, leased the same to the defendants for a term of twelve years from April 1, 1833, at a rent of \$130, payable annually on the 1st of April each year during the term.

On the 5th of April, 1837, said Capron mortgaged the leased premises to the plaintiff, to secure the payment of \$2,250 in one year from date, which has never been paid. In May, 1837, the plaintiff gave notice of this mortgage to the defendants. The defendants have paid to the plaintiff the annual rents due April 1, 1838 and 1839, which accrued after the mortgage to the plaintiff; but they refuse to pay the rent due April 1, 1837, which became due and payable to Capron, the lessor, five days before his mortgage to the plaintiff; and the question is, whether the plaintiff is entitled to recover that year's rent.

The mortgage from Capron to the plaintiff described the premises as under lease to Thayer & Fairbanks for a term of years, and adds:

“Should the conditions of the mortgage be broken, the rents, dues, and demands, of every kind arising out of said leased premises, due or becoming due, shall be paid to said Burden, his executor, and all the leases shall be assigned to him, and he is authorized to demand and receive the same in his own name, or

*See Secs. 1454-1460, Vol. 10, *Cyclopedia of Law*.

**See Sec. 1454, Vol. 10, *Cyclopedia of Law*.

that of said William Capron, and proceeds appropriated to the payment of said mortgage."

The Court are of opinion that the plaintiff has no right to recover the year's rent which fell due and was payable, and in arrear, when he took his deed of Capron. *When a man takes a deed, either by way of absolute conveyance or mortgage, of an estate which is under a lease for years, he must take such estate as his grantor had; which, in that case, is a reversion—the estate subject to the lease. But the rent is incident to the reversion and passes with it, and the grantee or mortgagee, by force of the conveyance, has a right to receive all rent accruing upon the estate; it is a part of the realty and passes by the deed. But when rent is payable quarterly or yearly, the annual or quarterly payments are not to be apportioned. If the reversion is transferred before the time at which the rent becomes due, the right to such quarter's or year's rent passes with the reversion. In the present case, had the year's rent become due five days after, instead of five days before, the mortgage to the plaintiff, it would have passed by it to the plaintiff. The rule is well expressed in Cruise's Digest, Tit. 28 c. 1 § 65. The right to a rent service is real estate descendible to the person who is entitled to the reversion. But from the moment that a payment of rent becomes due it will go to the lessor's executor.*

Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by St. 4 Anne, c. 16, § 9, a grant of the reversion is good and effectual without attornment: *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the Revolution and this provision being a rule in amendment of the common law, we may probably consider it in force here: *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures which were in use under our former government: *Farley v. Thompson*, 15 Mass. 25, 26.

The general principle that all future accruing rent passes with the reversion is confirmed by the case of *Birch v. Wright*,

1 T. R. 378. These principles apply to all effectual conveyances of the reversion, whether by absolute deed or by mortgage. Then let us apply them to the case of a mortgage of an estate under lease, and with reference to other cases determining the relative rights of mortgagor and mortgagee.

It is now well settled that a mortgage in fee transfers presently all the title which the mortgagor has in the estate; and this includes the right to enter and hold possession of the estate, even though the mortgage is given to secure the payment of a debt at a future day, unless there is some stipulation that, until a breach of the condition, the mortgagor shall hold possession. In such case, the rents and profits of the mortgaged premises constitute a part of the fund pledged for the payment of the principal and interest of the debt to be secured; and must be accounted for by the mortgagee: *Newall v. Wright*, 3 Mass. 138. But in such case, it is optional with the mortgagee whether he will enter or not; and, in general, if the estate is ample security for the debt and interest, it is not for the interest of the mortgagee to incur himself with a liability to account; and therefore it commonly happens that in case of a mortgage in fee the mortgagor is left in possession.

But in case the premises at the time of the mortgage are under lease for a term of years, the mortgagee cannot disturb the possession of the lessee, who has a prior title; and therefore he cannot enter. But as the mortgage transfers the reversion, to which the rent is incident; as it binds the whole of the realty, of which the rents afterward accruing are a part; he may give notice of his right to the lessee and of his election to take the rents, and then the lessee becomes bound to pay the rent to him as mortgagee. But if he does not elect to take the rents and account for them, then, in analogy to the right of a mortgagee in fee to enter or not, at his election, the mortgagee of a reversion may forbear to give notice to the lessee; and in that case the lessee will be protected in paying the rent to the mortgagor. And so it seems to be provided by the statute of Anne before cited, that no tenant shall be prejudiced by the payment of rent to his landlord until he has notice of the transfer of the reversion. This, it is strongly intimated by Mr. Justice Buller, in the case

of *Birch v. Wright*, 1 T. R. 385, would have been the rule of the common law, if no such proviso had been expressed in the statute.

But it seems to be extremely well settled by the cases that the rent, which became due and was in arrear at the time of the assignment of the reversion, whether absolutely or by way of mortgage, was a part of the personalty due to him who had the reversion when it accrued, and did not pass to the grantee or mortgagee of the reversion: *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 T. R. 378; *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 268; *Demarest v. Willard*, 8 Cow. 206. To apply these rules to the present case, it results that at the time the rent now in question fell due, April 1, 1837, William Capron was the holder of the reversion in his own right, and by force of the lease was entitled to the rent. It then became a debt to him, a chose in action, and did not pass by the mortgage to the plaintiff. But as the plaintiff did give notice to the tenant, in May, which was before another year's rent became due, he acquired a right to the rent which accrued April 1, 1838, although it was before condition broken. This, however, is stated on the assumption that there was no stipulation in the mortgage that the mortgagor should retain possession until condition broken. This is not stated in terms, but we take it for granted, though not now material to this case, because that year's rent has been paid into Court by the defendant.

But another ground is taken in argument, arising out of the special terms of the mortgage, as above cited. It is contended that, by force of that special clause, Capron assigned to the plaintiff rents, dues, and demands arising out of said leased premises, due or becoming due, etc. It may well be doubted whether this did not look to the contingency of the condition being broken by the non-payment of the debt, and means to transfer to the mortgagee such sums as should be then due. But the decisive answer is that this, if available at all, was nothing more than the assignment of a chose in action. The year's rent then due and in arrear was a debt, and though it arose out of the land, yet had become wholly detached from it. All the above authorities, which go to show that it had ceased to be part of the realty and that it did not pass by the conveyance of the land, establish the point that it was a mere chose in

action. Being so, it cannot be recovered by the plaintiff in his own name, whatever equitable right he may have to claim it in the name of the assignee. See *Willard v. Tillman*, 2 Hill's (N. Y.) Rep. 274.

According to the terms of the report, the order must be that a new trial be granted; but as this opinion is decisive of the plaintiff's case, the proper course will be, if the plaintiff consent, to enter a NON-SUIT.

The Right of Alienation is an Incident to a Fee Simple Estate, and Cannot Generally be Restricted.

BLACKSTONE BANK v. DAVIS.

21 Pick. 42. 1838.

The defendant claimed title under the following clause in his father's will:

"I give to Erastus, my son, the use of the Bartlett farm in Millbury containing about 120 acres. Said farm is not to be subject or liable to conveyance or attachment."

WILDE, J. This is an action of trespass *quare clausum fregit*, and the only question submitted by the facts agreed is the question of title, the breaking and entering of the close by the defendant being admitted. It is not questioned that the devise respecting the Bartlett farm is a good devise to pass the farm to the devisee. By the devise of the profits, use or occupation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the Court cannot entertain a doubt.

A condition in a grant or devise, that the grantee or devisee shall not alienate, is void because repugnant to the estate: Co. Lit. 223 a. And so it is as to a condition annexed to a gift or

sale of a term for years, or any other chattel real or personal. A condition or proviso to restrain or prohibit the operation of an attachment and levy of an execution, is void for the same reason, and because it is contrary to law, which makes a man's property liable for the payment of his debts. A condition that the grantee or devisee shall not alienate for a particular time or to a particular person or persons, is good. So, in a devise to a minor provided he shall not come into possession, occupy, or have any advantage of the estate during his minority except through his guardian, who is to lease, occupy, and improve the estate, the proviso is good and valid in law: Smithwick v. Jordan, 15 Mass. R. 113.

The clause in the devise under consideration is without any limitation, and declares that the property devised shall not be subject to conveyance or attachment perpetually. Such a declaration or provision the testator had no authority to make. It was an attempt to impose a restraint upon property which the law will not allow, and the provision is clearly void.

DEFENDANT DEFAULTED.

COWELL v. SPRINGS CO.

100 U. S. 55. 1879.

Mr. Justice FIELD. In May, 1873, the plaintiff in the Court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon

afterward opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. *Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character: Shepard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.*

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended: 14 Kan. 61. See, also, *Doe v. Keeling*, 1 Mau. & Sel. 95, and *Gray v. Blanchard*, 8 Pick. (Mass.) 283.

*We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See, also, *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693.*

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the

recital that the land was purchased by the patentee of the government, thus negating the inference that the latter retained any interest in the property or advanced the purchase-money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust: it did not prevent the legal title from passing by his conveyance: Perry, Trusts, § 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado and to hold and convey real property there. By the law of March 2, 1867, then in force, the Legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits: 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reason of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on

any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the Territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property, also to construct and operate ditches, wagonroads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the Legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the Territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is

not important; that is a matter between the government of the State, succeeding that of the Territory, and the corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity: *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 552.

But there is another, and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of this condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it: *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 185; *Miller v. Shackelford*, 4 Dana (Ky.), 287, 288; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

JUDGMENT AFFIRMED.*

*Other incidents to an estate in fee simple are: dower, courtesy and right of descent. *Brackett v. Leighton*, 7 Me. 383; *Watson v. Watson*, 13 Conn. 83; *Estate of Denohue*, 36 Cal. 329.

Meaning of a Remainder—Vested and Contingent Remainders. **

GREEN v. HEWITT.

97 Ill. 113. 1880.

The plaintiffs file a bill in equity for a partition of the lands mentioned in the opinion.

**See Secs. 1455-1460, Vol. 10, *Cyclopedia of Law*.

MULKEY, J. The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows:

"Second. After the payment of such debts and funeral expenses, I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the north-east quarter of the south-west quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson."

Plaintiffs in error insist that under this provision of the will Elizabeth Thompson took an absolute fee-simple estate in the premises therein mentioned, which are the same lands now in controversy, and of which partition is sought by complainants' bill. If she did not take an inheritance, as contended, but a mere life estate, as is claimed by defendants in error, then it is clear complainants showed no title to the premises in themselves, and the demurrer to the bill was therefore properly sustained by the Court.

To us there seems no room for doubt as to the proper construction of the clause in question. The devise of the farm and personal estate is expressed in a single sentence, one clause of which relating to the land, and another to the personalty. By their punctuation these clauses of the sentence are merely divided by a comma and are connected by the conjunctive adverb "also," which, in that connection signifies in *like manner*, or in addition to; that is, the testator gives and bequeaths the farm, and in like manner gives and bequeaths the personalty. Then follows the qualifying or adverbial clause, "so long as she remains my widow," which is introduced for the purpose of limiting the entire gift, both of personalty and realty, to the widowhood of the taker. He gives and bequeaths both only so long as she remains his widow. This is both the grammatical and legal construction of the sentence. The meaning is precisely the same as if the testator had said: "I give and bequeath to my beloved wife, so long as she remains my widow, the farm, etc., on which we now reside, and in like manner I give and bequeath to her all my personal

estate." She took a mere life estate in the entire gift. The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression "whatever remains" by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to override the clearly-expressed intention that the widow should take a life estate only.

As part of the estate devised was personalty, it is but reasonable to suppose that some of it would be of that species of property whose value and use consist solely in its consumption, such as provisions, etc., and it was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression "whatever remains." It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has.

It is further claimed by plaintiffs in error that the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely: when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage.

A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly fatal to their right of recovery; for, if the daughter took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee-simple title under the will.

We are, in any view, clearly of opinion that the decree of the Circuit Court was right, and it is therefore affirmed.

DECREE AFFIRMED.

HUNT v. HALL.

37 Me. 363. 1853.

One having only a contingent interest in lands brings an action of waste against the defendant, who is acting under permission from the life tenant.

APPLETON, J. This is an action of the case in the nature of waste, and it is brought under the provisions of R. S., c. 129, §§ 4 and 5.

Ephraim Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.

The rights of the parties depend upon the nature of the estate, which was devised by the will of Ephraim Hunt, which was in the words following:—"After the decease of my dear wife, my will is that my executor, hereafter named, cause an equal division to be made among *all my children and the heirs of such as may then be deceased.*" The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of

the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

“Contingent or executory remainders (whereby no present interest passes) are when the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious or uncertain *event*; so that the particular estate may chance to be determined and the remainder never take effect:” 2 Bl. Com. 169. In *Olney v. Hull*, 21 Pick. 311, the words of the devise were almost identical with those in the case now under consideration, and the Court held that until the death of the widow, it was uncertain, who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive: 2 Cruise’s Dig. Title 16, Remainder, c. 1, § 21. So where one devised lands, to his daughter H. and her husband, for their respective lives, and after their death to the heirs of H., it was held that the remainder was contingent until the death of H., and then vested in the persons who were then heirs: *Richardson v. Wheatland*, 7 Met. 169; *Sisson v. Seabury*, 1 Sum. 235.

It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of R. S., c. 129, and consequently are not entitled to maintain this action.

Exceptions overruled. NON-SUIT CONFIRMED.

CHAPTER VI. OF ESTATES UPON CONDITION.*

*What is Meant by an Estate Upon Condition.***

WARNER v. BENNETT.

31 Conn. 468. 1863.

SANFORD, J. In our opinion the conveyance from Tomlinson to Bennett and others was of a fee-simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs and assigns forever, for certain uses specified in the deed, which contains the following clause: "The *conditions* of the within deed are such that whenever the within-named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within-described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says, estates upon condition "are such whose existence depend upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated:" 2 Bla. Com. 151. Littleton says, "it is called an estate upon condition because that the estate of the feo-fee is *defeasible* if the condition be not performed;" § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement:" 1 Bouvier's Inst. 285. Conditions are precedent or subsequent. "Precedent are such as

*See Secs. 1461-1481, Vol. 10, Cyclopedia of Law.

**See Sec. 1461, Vol. 10, Cyclopedia of Law.

must happen or be performed before the estate can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already vested may be defeated:" 2 Bla. Com. 154. *In the case of a condition "the estate or thing is given absolutely without limitation, but the title is subject to be divested by the happening or not happening of an uncertain event. Where on the contrary the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation:" 2 Bouvier's Inst. 275; 2 Bla. Com. 155.*

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not until they should convert the property to other uses than those specified in the deed, nor so long as they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should forfeit their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "the conditions of the within deed are such," etc. And in *Mary Portington's Case*, 10 Coke, 41a, it is said that "express words of condition shall not be taken for a limitation." It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (*Lady Anne Fry's Case*, 1 Inst. 202), but there is no such limitation over in the case before us. So when it is said that "whenever the within-named premises shall be converted to any other use," etc., "the grantees forfeit the right herein conveyed," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition in deed or a limitation? No matter how many events the forfeiture depends upon nor how many individuals must act in producing them, when all

those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made *available* only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs by an entry (or its equivalent, a continual claim) have manifested in the way required by law, their determination to take advantage of the breach of condition, to avail themselves of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on real property, page 450, with accuracy and precision: "A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and

until that is done it loses none of its original qualities or incidents." See also *Ib.* 452; 2 *Bla. Com.* 155; 2 *Cruise Dig.* 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so: 2 *Cruise Dig.* 4; 4 *Ib.* 113; 1 *Spence Eq.* 153; 1 *Swift Dig.* 93. The grantor or his heirs only can enter for breach of such condition: 1 *Washb. on Real Prop.* 451; 2 *Cruise Dig.* 44. The petitioner therefore could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a Court of Equity, because that Court never lends its aid to enforce a forfeiture: 4 *Kent Com.* 130; 2 *Story Eq. Jur.*, § 1319; *Livingston v. Tompkins*, 4 *Johns. Ch.* 415.

Lastly. If the right, title, or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a Court of Equity for relief. We do not see why he might not have entered for breach of the conditions, requested the re-

spondent to unite with him in procuring an appraisal of the building, if he refused procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put an end to the grantee's estate and obtain possession of the property, we think, could not have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift Dig. 295; Powell on Cont. 417; Whitney v. Brooklyn, 2 Conn. 406. We know of no power in a Court of Equity to compel the respondent to join the petitioner in procuring an appraisal, nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

THERE IS MANIFEST ERROR IN THIS RECORD.

*An Estate Upon Condition Distinguished from an Estate Upon Conditional Limitation.**

HENDERSON v. HUNTER.

95 Pa. St. 335.

AGNEW, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitations of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original

*See Sec. 1465, Vol. 10, Cyclopedia of Law.

owner), according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on *Executory Interests*, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if," "whilst," and "during," as when land is granted to one so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120-21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the

church, by the members to whose use in that manner it had been granted; and the reversion ipso facto returned to Thomas Pillow the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing; for a mere temporary suspension of service there, or a discontinuance of the use without authority, would not, *ipso facto*, determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

According to the constitution and discipline of the Methodist Episcopal Church of the U. S., its preachers, denominated deacons and elders, are not called by the societies to which they preach, but are appointed to stations, and to travel in circuits, by the presiding bishop of the annual conference. The power is lodged in him, but from a practical necessity he acts with the advice of his council of presiding elders assembled at the annual conference. The government of the church is clerical and not lay. It has no admixture of the laity, excepting in the quarterly conference of the circuit or station, in which certain lay official members are admitted to seats *ex necessitate rei*. The annual conferences are composed of the deacons and elders in the traveling ministry within the respective conferences, presided over by a bishop or superintendent as originally termed, assigned to hold the conference by the board of bishops. The general conference consists of delegates, elected by all the annual conferences from among the traveling preachers, presided over by the bishops in turn, and holding its sessions quadrennially.

The annual conferences are divided into districts, composed of the circuits and stations within their respective boundaries. Over each district the bishop, at the annual conference, appoints an elder to preside, who travels his district four times a year, and presides at the quarterly conferences in each circuit

or station, composed of the traveling and local preachers, exhorters, stewards, class leaders, trustees, and first male superintendent of Sunday-schools. A station has a single place of stated public service, while a circuit has several. It is to these circuits and stations the traveling preachers are assigned at every annual conference. In his circuit or station the preacher in charge arranges or "plans" the appointments of service during the term of his own appointments. In planning the circuit he *may* take the advice of the stewards, if he choose to ask it; and in arranging the appointments for service it is his duty to give the local preachers within his charge regular and systematic employment on the Sabbath.

No specific directions are found in the discipline as to the arrangement of the appointments, and the whole subject seems in a great measure committed to the sound discretion of the traveling preacher in charge, subject only to the discipline duty of preaching where there is the greatest number of quiet, willing hearers, the most fruit, and where the Spirit most abounds; and subject to the superintending control of the presiding elder, whose duty it is to oversee the spiritual and temporal business of the church; to take charge of all elders and deacons in his district, and to take care that the discipline shall be enforced in his district.

As to the particular building or house in which services shall be statedly held, there is nothing definite in the discipline, and the authority over it seems to be only inferential, arising out of the power of the preacher in charge to arrange the appointments of service, which must include places as well as times of appointment. This vagueness probably flows from the fact that at just this point the boundary of church polity interlocks with the lines of popular support, for money and members must come from the laity. Still church polity reserves a large share of control over church property, as will be seen in the chapter on this subject; with a sorrowful recognition, however, of its dependence, for plainness and economy in the building of churches is enjoined, lest the necessity of raising money make *rich* men necessary to the church, and if so (says the disciple), "we must be dependent on them, yea, governed by them, and then farewell to Methodist discipline, if not doctrine, too."

In order to preserve control, however, it is made the duty of the quarterly conferences to secure the ground on which churches are to be built according to the deed of settlement, and to admit no charter or deed that does not secure the rights of the preachers of the church in the ministration of its services according to the true meaning of the deed of settlement, the form of which is prescribed.

Thus the effect of this active control of the clerical authorities of the church over preachers, preaching, and church property, is to take from the society at large, or laity, the power of continuing any building as a place of worship according to the rules and discipline of this church, after the ecclesiastical authority has resolved to discontinue the services of its preachers there. The society might choose to worship there of their own head, and call a preacher of their choice who was willing to come without the authority of his church, but in doing so they would cut themselves off from their church connection, and would be worshipping there no longer as members of this church under its rules and discipline; for to worship as members and under the discipline they must accept the traveling preacher sent to them by the bishop. Consequently, the trust in this case ceased when the proper church authorities, acting under and according to the rules and discipline, totally abandoned the building as a place of worship for the members of this church.

The fact of such an abandonment was submitted by the judge and found by the jury. In his charge the learned judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there and the causes thereof. This was all he could do, as the question of fact belonged to the jury.

The reverend gentleman had testified that the church had been abandoned by the conference in March, 1867, and that this action having been taken by his bishop and his council of presiding elders, and the preaching removed to the school-house in the village, any preaching in this building after the conference, was without the sanction or authority of the church.

I must say I have not discovered in the discipline the precise ground of the bishop's authority to do this; yet it may be a

proper understanding of his authority as gathered from the entire body of church law, and the rule in the civil court is that the churches are left to speak for themselves in matters of discipline and doctrine. *German Reformed Church v. Commonwealth*, 3 Barr, 282. But however the fact may be, where the precise power is lodged, certain it is in this case this proof was made, and with it the fact that the abandonment of the building had also the express sanction of the presiding elder and inferentially the sanction of the preacher in charge.

We cannot say, therefore, that the fact of abandonment was submitted without sufficient evidence. The fact being found by the jury, these plaintiffs—at the time of the removal of the building—were no longer trustees of the property by the very terms of the limitation in the deed, and had no ownership or estate to enable them to maintain this action.

This is sufficient for the purposes of this case. But it is also insisted that these trustees were superseded by the election of new trustees by the quarterly conference under a new rule adopted by the general conference of 1864. We shall express no opinion on this point, the interest depending on the form of the deeds made previous to 1864, being too important to be determined upon a meager presentation of the case to us. It is proper, however, to suggest to the church authorities that this is, perhaps, perilous ground to stand upon. The church may provide a new mode for the election of trustees, and make their deeds hereafter conform to this mode. But when it comes to the right to supplant trustees established by contract, or to fill vacancies in a mode differing from the terms of the contract, which are the laws of the trust, a new question arises.

A deed is a contract *inter partes*, the grantor on one side and the trustees on the other, and even the legislature cannot impair the contract. If conflicts should arise between the trustees nominated or provided for in the deed and those appointed by the quarterly conferences, it may be found difficult to overthrow the will of the grantor or first party in the deed expressed in this contract form.

JUDGMENT AFFIRMED.

*A Condition is to be Distinguished from a Trust.**

NEELY v. HOSKINS.

84 Me. 386.

PETERS, C. J. This is a real action to recover a lot of land, with a church edifice thereon situated in Old Town, the demandant claiming under a deed to himself from Ira Wadleigh, dated November 21, 1885, which, omitting formal parts and description of premises, is as follows:—

*“Know all men by these presents, that I, Ira Wadleigh, now of Sacramento, in the State of California, formerly of Old Town, Maine, by Joseph B. Moor, of Bangor, my lawful attorney duly and legally authorized to make and execute and deliver these presents, in consideration of five hundred dollars to me in hand paid by George Burgess, of Gardner, bishop of the Protestant Episcopal Church for the diocese of Maine, the receipt whereof is hereby acknowledged, do hereby give, grant, sell and convey unto the said George Burgess, bishop as aforesaid, upon the condition that it shall be forever for the use of the Protestant Episcopal Church at Old Town, and to his successors in said office forever, a certain lot of land on the east side of Marsh’s island, in Old Town, county of Penobscot, Maine, and all the buildings, fixtures, and property thereon at the date hereof, known as ‘St. James’ Church and Lot,’ to wit: * * * Reserving and excepting from said conveyance to said Wadleigh and to J. H. Hillard, their heirs and assigns, the occupation of three pews numbered eleven and thirteen, and to said Hillard the pew heretofore conveyed to him by deed from said Wadleigh or the parish of St. James’ Church. * * **

“To have and to hold the aforegranted premises, with all the privileges and appurtenances thereof, to the said George Burgess, and his successors in said office, forever. And I do covenant with said grantee and his successors that said premises are free of all incumbrances created by me, and that I and my heirs shall and will warrant and defend the same to said grantee and his successors forever against the lawful claims and demands of all persons claiming by, through, or under me.

“In witness whereof I, the said Wadleigh, by Joseph B. Moor, my attorney, authorized as aforesaid, for the consideration aforesaid, have hereunto set my hand and seal this ——— day of ———, in the year of our Lord one thousand eight hundred and sixty-five.”

The defendants are grantees and heirs of Ira Wadleigh, now

*See Sec. 1466, Vol. 10, Cyclopædia of Law.

deceased, and claim that the foregoing is a deed upon condition subsequent, that the condition has been broken, and that the estate has reverted to themselves as such heirs.

Upon the question of forfeiture and reverter, and of estoppel and waiver, much is adduced on both sides, and many arguments urged. The defendant's counsel, however, deny that the conveyance is upon condition, contending that it is to be construed as a deed of trust merely. If this position be tenable, and we feel constrained to so hold, all the other questions that have appeared in the case become superseded thereby.

It is not expressed in the deed that the estate shall be revertible for any cause, but it is contended that the idea is implied. The term "condition" does not necessarily import it. "Condition" may mean "trust," and "trust" mean "condition," oftentimes. The construction must depend upon the context and any admissible evidence outside of the deed.

An examination of certain prior instruments of conveyance to Wadleigh from the parish, named in his deed to the bishop, will very much assist in showing the intention of the parties as contained in the deed in question.

The parish, having a full title to the property, excepting as incumbered by mortgage, conveyed, on July 8, 1852, to Wadleigh certain pews in the house by a deed of the following form:—

“Know all men by these presents, that we, the undersigned, wardens of St. James' Church, in Old Town, being duly authorized in the premises, in consideration of large claims against the parish given up to us in said capacity by Ira Wadleigh, Esq., which we do hereby acknowledge, have bargained, sold, and conveyed, and by these presents do hereby bargain, sell, and convey, unto said Wadleigh and his heirs and assigns forever, the right to occupy, use, and enjoy forty-five pews in St. James' Church, in Old Town aforesaid, and the privileges to said pews belonging, said pews being numbered as below.

“This conveyance is on the condition that neither the said Wadleigh, nor his heirs or assigns, shall change the worship in said church to any other denomination than that of the Protestant Episcopal Church, or in any manner consent that it may be changed, and it shall be void, and the property revert, if so changed, either wholly or in part.

“To have and to hold the rights aforesaid to him, said Wad-

leigh, and his heirs and assigns, forever, upon the condition aforesaid. And we do hereby in our said capacity covenant with said Wadleigh that said pews are free of all incumbrances, and that we in our said capacity will, and the wardens of said church shall, warrant and defend said pews on the condition aforesaid, to him, said Wadleigh, and his heirs and assigns forever, against the lawful claims and demands of all persons.

"In testimony whereof we, the wardens of the church aforesaid, have set their hands and affixed their seals this eighth day of July, A. D. 1852, in our capacity of wardens.

"The pews hereby conveyed are numbered as follows: * * *

"Signed, sealed and delivered in the presence of us.

"D. C. WESTON. IRA WADLEIGH. [L. S.]

"CONY FOSTER. [L. S.]"

On the same day the parish made to him another deed (omitting a part of the description of the premises), as follows:—

"Know all men by these presents, that we, Ira Wadleigh and Cony Foster, wardens of the parish of St. James' Church in Old Town, Maine, being duly authorized in the premises, in consideration that Ira Wadleigh, Esq., of said Old Town, has given to the said parish a receipt in full of all demands, and has also given to said parish a full release and discharge of a mortgage against said parish, recently assigned to said Wadleigh by Samuel Blake, Esq., do hereby give, remise, release, sell, and forever quitclaim unto the said Wadleigh, his heirs and assigns, a certain parcel of land, with the church and one other building thereon, lying on the east side of Marsh Island, in said Old Town, viz.: Lot numbered fourteen, according to Herrick's plan of part of lot numbered fifteen, Holland's survey and plan, and bounded as follows: * * * Being the same lot conveyed to the parish by Turner Cowing and James Green, November 20, 1840.

"To have and to hold the aforementioned premises, with all the privileges and appurtenances to the same belonging, to the said Wadleigh, and to his heirs and assigns, forever, subject to the following reservations and conditions:—

"The said parish reserves to itself forever the ownership of all the pews in said church, together with free, sole, unconditional, uninterrupted, and exclusive use, occupation and control of said church, with its appurtenances, except the basement hall, forever. This reservation includes the furnace and cellar in the rear of said hall, with the right of access at all times to and from said cellar through said hall.

"The parish reserves the right to repair and alter said church and to rebuild it, if destroyed from any cause, on the old founda-

tions, free of all charges of ground rent forever. It is understood, however, that the insurable interest in said church and its appurtenances is to be and remain in the said Wadleigh, his heirs, representatives, and assigns, the insurance thereof to be made in his and their names, and for his and their use and benefit, the said parish divesting itself of all insurable interest; and the foregoing reservations are made subject to this qualification:—

“The insurable interest thus made available to the said Wadleigh is intended as a compensation in part for the great expenditures and sacrifices which he has made in behalf of said parish in the erection of said church. The following are the conditions on which this deed is given:—

“Condition first is that neither the said Wadleigh, nor his heirs nor assigns, shall ever use said basement hall, nor allow nor suffer it to be used on Sundays; so that the church services may never be disturbed on this holy day by any movements or noise underneath. Nor shall said hall be used on any other day of the week for any purpose that may be an annoyance to the parish, or disturb the week day services in said church.

“Condition second is that so much of the lot hereby conveyed as lies east of a line twenty feet distant from the west end of said church, and parallel thereto, shall always be left with said church for its accommodation.

“In witness whereof we, the said Wadleigh and Foster, have hereunto set our hands and seals this eighth day of July, A. D. eighteen hundred and fifty-two, in their capacity of wardens aforesaid.

“IRA WADLEIGH. [L. S.]

“CONY FOSTER. [L. S.]

“Signed, sealed, and delivered in the presence of

“NATHAN WESTON,

“DANL. C. WESTON.”

These deeds, as explained by other facts, show quite conclusively that the deed to the bishop was intended to be a conveyance in trust, and not upon any condition that could work a forfeiture to the grantor. The only condition that was created lies between the bishop and the parish.

One very influential fact, tending to show the correctness of this conclusion, is that the conveyance was not a gift or donation from Wadleigh, but a purchase from him by the bishop, who collected the money for the purpose from sources outside of the parish. Then there is the further fact that Wadleigh conveyed not much more than a technical title to the property,

already loaded with restraints and conditions in favor of the parish, giving only a quitclaim deed or what amounts to such. He had not the estate to convey. At most he had but a limited right of possession and use in a basement hall in the building, and a right of occupation in a considerable number of pews. It would certainly be unusual to annex such a condition as is pretended upon a purchase of such an interest in such a property.

It will be seen from the deed to Wadleigh what a burden was imposed upon his estate by conditions and restrictions. "The parish reserves to itself forever the ownership to all the pews in the church, together with the free, sole, unconditional, uninterrupted, and exclusive use, occupation and control of the church and its appurtenances, except the basement hall." It also reserves some right of use of the hall, and restricts the grantee in his use of it. And it retains the perpetual right of repairing the church, and to rebuild the same without payment of rent, in case of its destruction by fire.

Besides, the testimony shows that the deed of the parish to Wadleigh includes valuable land adjoining the church, not included in the deed from him to the bishop. The latter deed excludes enough land for two good house lots, and does not even include the territory upon which the rectory belonging to the church stood at the time.

In view of all the circumstances, the witness Sewall, who would be perhaps more likely than any other person to be informed on the question, testifies that the \$500 paid was an adequate consideration for the interest purchased. At all events, that sum was satisfactory to the grantor, who had removed from Old Town, and was then in California. The parish was evidently poor, and the pews neither valuable nor salable. Of course, if the premises were worth no more than that sum to sell, there would be no more value in them to the grantor upon a reverter. The heirs are mistaken in supposing if such be their view that a forfeiture of the interest to them would discharge the conditions imposed upon the property by prior deeds. In the light of these facts, it seems unreasonable to believe that the grantor Wadleigh would have asked for conditions of forfeiture, or that the grantee would have submitted to any.

Furthermore, there is every reason to believe that the grantor

never conceived the idea of inserting any condition for his own benefit in the conveyance. The deed was executed in his name and for him by Joseph B. Moor, a son-in-law, under the authority of a general power of attorney to take possession of all his real and personal property in Penobscot County and any property in which he was interested, and sell the same, or any part thereof, for such sums or prices and on such terms as to him should seem meet. The same grantor sells to Charles Wadleigh a balance of the church lot not covered by his deed to the bishop, describing it as "all the land west of the premises heretofore by me conveyed to George Burgess, bishop of the diocese of Maine, *in trust* for the parish of St. James."

He not only thus describes the conveyance as a trust, but the bishop does the same thing, who undoubtedly dictated the form of the deed by the following written communication:—

"GARDINER, May 3, 1865.

"MY DEAR SIR: I have written to Mr. Joseph B. Moor, of Bangor, who Mr. Wadleigh authorized, by his power of attorney, to make a deed of his interest in the church at Old Town; and have informed him that I would request you, as Mr. Wadleigh suggested, to prepare the deed, and would have the money, \$500, in readiness at the time of its execution.

"The deed, it appears to me, should be made to me, as bishop of the Protestant Episcopal Church in Maine, and to my successors in office, in trust for the parish of St. James' Church, Old Town.

"You will judge best whether it should be a quitclaim deed or more. You will also satisfy yourself, I presume, by examination, that there is no other incumbrance.

"Mr. Wadleigh reserves five pews, and they should be designated. He fixes the boundary at twenty-five feet west of the church. If you will send me the draft of the deed before it is executed, I will send it back with a check for the money.

"Respectfully yours,

"GEORGE BURGESS."

"HON. G. P. SEWALL."

If it be inquired why there were inserted in the deed to the bishop the words, "upon the condition it shall be forever held for the use of the Protestant Episcopal Church in Old Town," the answer is that the bishop was buying the interest for the parish and not for himself. He collected the money paid for the purpose for the parish, and not for himself. Therefore he

was to hold the property for the benefit and use of the parish. Had the bishop taken a deed to himself in unqualified terms, the parish would have stood in the same relation towards him as they had before stood with Wadleigh. The object was to extend relief to the parish, and to obtain its freedom from such claim in the hands of Wadleigh or any one else. It was not to have the claim of Wadleigh assigned, but to extinguish it.

Undoubtedly the deed contains a condition for the benefit of the parish, but not for Wadleigh's benefit. It operates between the parish and the bishop, and is not available otherwise. Every trust implies a condition that the trustee will faithfully administer the trust. Equity would enforce this trust at the instance and for the benefit of the parish. But the heirs of Ira Wadleigh could not complain. *Sohier v. Trinity Church*, 109 Mass. 1.

JUDGMENT FOR DEFENDANT.

Walton, Virgin, Emery, Foster, and Haskell, JJ., concurred.

*Meaning of an Executory Devise—the Rule Against Perpetuities.**

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE
v. GRANT ET AL.

3 Gray, 142. 1855.

A house and land were devised to the deacons of a church and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H. and to his heirs forever."

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to

*See. Sec. 1471 et seq., Vol. 10, Cyclopaedia of Law.

our consideration. In a suit in equity between the same parties, which was pending several years ago in this Court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the Court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs-at-law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle Street. If the gift had been solely to the deacons of the church in Brattle Street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without

doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate: Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or deviser, and his heirs. Upon a breach of the condition the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach: 2 Bl. Com. 156; 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. *A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the*

heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or deviser immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or deviser. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or deviser or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference therefore between an estate in fee on condition and on a conditional limitation is briefly this, that

the former leaves in the grantor a vested right which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the fee and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limita-

tions include certain estates in remainder as well as gifts and grants which, when made by will, are termed *executory devises*, and when contained in conveyances to uses assume the name of *springing or shifting uses*: 1 Preston on Estates, §§ 40, 41, 93; 4 Kent Com. (6th ed.) 128, note; 2 Fearne Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192 and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate: 1 Jarman on Wills, 780; 4 Kent Com. 197. *Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which*

does not constitute an actual estate: 4 Kent Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a quasi corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise: 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig. tit. 38, c. 17, §§ 1, 2; *Purefoy v.*

Rogers, 2 Saund. 388 a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a deviser disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise: 4 Kent Com. 368; 6 Cruise Dig. tit. 38, c. 17, § 2; Bac. Ab. Devise, I, 1 Fearné Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the deviser by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against perpe-

tuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise: 4 Kent Com. 266; 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this Commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities: 4 Kent Com. 267; 1 Jarman on Wills, 221; 4 Cruise Dig. tit. 32, c. 24, § 18; Nightingale v. Burrell, 15 Pick. 111; see, also, Cadell v. Palmer, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect: Nightingale v. Burrell, 15 Pick. 111; 4 Kent Com. 283; 6 Cruise Dig. tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testa-

trix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendable: Bacon v. Proctor, Turn. & Russ. 31; Mackworth v. Hinxman, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: Ker v. Lord Dungannon, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or per-

sons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits: *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dru. & War. 245, 253. In this case Lord Chancellor Sugden says: "This is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for his family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz.: while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterward. It can make no difference in the application of the case cited that it was the gift of an equitable fee simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity: *Lewis on Perp.* 169; 4 Cruise Dig. tit. 32, c. 24, § 1; *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held that a limita-

tion, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl.

Com. 156; 4 Kent Com. 130; Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: *Tilbury v. Barbut*, 3 Atk. 617; *Tyte v. Willis*, Cas. temp. Talb. 1; 1 Fearn Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute: *Nottingham v. Jennings*, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearn Cont. Rem. 467; *Attorney General v. Gill*, 2 P. W. 369; *Busby v. Salter*, 2 Preston's Abstracts, 164; *Kampf v. Jones*, 2 Keen, 756; *Ring v. Hardwick*, 2 Beav. 352; *Miller v. Macomb*, 26 Wend. 229; *Ferris v. Gibson*, 4 Edw. Ch. 707; *Tator v. Tator*, 4 Barb. 431; *Conklin v. Conklin*, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee.

The remainder would have been void, and the fee simple absolute would have vested in the first taker: 6 Cruise Dig. tit. 38, c. 12, § 20; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless: *Shep. Touch. (Preston's ed.) 417*. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over: *Egerton v. Earl Brownlow, 4 H. L. Cas. 1*. *So in the case at bar the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void;" "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases: Shep. Touch. 129, 133. See, also, H. L. Cas. 160.*

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate of John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law: 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The Court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause: 2 Pow. Dev. 102-104; Hayden v. Stoughton, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remain in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any differ-

once in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. *The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over.* Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation: 2 Cruise Dig. tit. 16, c. 2, § 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and

valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the Court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix,

in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may, therefore, be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

SMITH v. KIMBALL.

153 Ill. 368.

MAGRUDER, J. This is a bill for the specific performance of a contract for the sale of real estate, filed by appellant against appellee. The bill was answered, and, after hearing had, the circuit court found the equities with the defendant, and dismissed the bill. The present appeal is prosecuted from such decree of dismissal. By the terms of the contract, appellee agreed to purchase lot 3, hereinafter mentioned, of appellant, for \$9,000, payable, \$100 in cash, and "the balance in twenty days after receiving an abstract showing good title" in appellant. The abstract of the title was furnished within the 20 days, and appellee refused to carry out the purchase, upon the ground that the abstract did not show a good fee-simple title in appellant. Appellant holds by deed from Frederick Mohlenpaugh, who received a conveyance from Sarah Jane Dustan. Sarah Jane Dustan, whose maiden name was Sarah Jane Spears, derived her title through the will of her mother, Abigail Spears. There is no question that Abigail Spears had good title, and that appellant owns whatever title was obtained by Sarah Jane Spears (afterwards Dustan) under said will. The question in dispute arises upon the construction of the will of Abigail Spears, which was executed on January 28, 1854, and, after providing for the payment of funeral expenses, is as follows: "Second. My just debts are to be paid, and I appoint Alexander Tulloe, of Joliet, my executor. I also will and direct that forty acres of land lying in Will County, State of Illinois, shall be sold, and, after discharging the above expenses, the balance shall become and be the property of my daughter, Sarah Jane Spears. I also di-

rect that lot No. 3, in block No. 21, in Joliet, Illinois, with its appurtenances, as deeded to me by David Richards and wife, and also all my interest in the lot of land now occupied by David Wooley, of La Porte County, State of Indiana, also my interest in the estate of my grandfather, Francis Lucas, all be and become the property of my daughter, Sarah Jane Spears; and, should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above-described property shall be equally divided between my sisters, to wit, Olinda Wooley, Deborah Wooley, Sarah Jane Wooley, Elizabeth Johnson; and it is my wish that my sisters, Deborah and Sarah, shall have the care and charge of my daughter, Sarah Jane Spears." Abigail Spears died on February 4, 1854, and left, her surviving, her daughter, the said Sarah Jane Spears, who afterwards married a man named Dustan, and has children living. The will was admitted to probate on February 11, 1854.

What title did Sarah Jane Spears take to the above described lot 3 under the will of her mother? The testatrix directs that said lot 3, and all her interest in the lot occupied by David Wooley, also her interest in her grandfather's estate, "shall be and become the property of my daughter, Sarah Jane Spears." No words of inheritance, such as "and her heirs," are here used. This language would, at common law, only have given a life estate in the land. But section 13 of the conveyance act provided that "every estate in land which shall be granted, conveyed or devised, although the words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Therefore, the clause directing that lot 3 "shall be and become the property of my daughter," standing alone, and without being qualified in any way by the language following it, vests in the daughter a fee transmissible to her heirs, *notwithstanding the omission of the word "heirs."* Baker v. Scott, 62 Ill. 86; Walker v. Pritchard, 121 Ill. 221; 12 N. E. 336; Wolfer v. Hemmer, 144 Ill. 554; 33 N. E. 751. Is a less estate limited by the words that follow, and, if so, what estate? Those words are "and, should the said Sarah Jane Spears die leaving no heirs, I

will and direct that all of the above described property shall be equally divided between my sisters."

In view of the construction thus placed upon the first clause, as being a clause which, standing alone, vests a fee in the devisee, it is manifest that this is a case where the fee in the first instance is conveyed to the first taker; but an effort is made to transfer this fee, upon the happening of a specified contingency, from the first taker to others, *by way of executory devise*. In other words an attempt is made to mount a fee upon a fee, and this can only be done by executory devise. "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyance at law." 4 Kent Comm., marg. p. 264. It is one of the rules governing contingent remainders that an estate cannot be limited over to another after a fee already granted. A remainder implies something left, and there can be nothing left after the whole has been once disposed of. It is for this reason that a fee already granted cannot be defeated and transferred to another by way of remainder. Hence the devise over, "should the said Sarah Jane Spears die leaving no heirs," can only be sustained, if at all, as an executory devise, and not as a contingent remainder. To prevent perpetuities in executory devises, it is an established rule that, in case of such a devise, the contingency upon which the intended limitation is to take effect shall not be postponed longer than a life or lives in being and 21 years and a fraction of another year thereafter. If the contingency is not fixed within that period, the executory devise is bad, and the limitation is void for remoteness; but, if it is so fixed, the devise is good, and the limitation is valid. In the present case the determination of the question whether the contingency upon which the limitation is to take effect is too remote, and by consequence, whether the limitation itself is void or not depends upon the construction to be given to the words "and should the said Sarah Jane Spears die leaving no heirs." *The limitation to the sisters of the testatrix is dependent upon the event that the daughter should die "leaving no heirs."* Do these words import a definite or indefinite failure of issue? A definite failure of issue is where a precise time is fixed by the will for the failure of issue; as in the case of a devise to A., but, if he dies

without issue living at the time of his death, then to another. An indefinite failure of issue means a failure of issue whenever it may happen, without fixing any time, or a certain and definite period within which it must happen. 4 Kent Comm., marg. p. 274; 1 Bouv. Law Dict., p. 642. *An executory devise which is to take effect upon an indefinite failure of issue is void for remoteness.* 4 Kent Comm., marg. p. 274. *The words "dying without issue," or "die without issue," when standing alone, are held by the great weight of authority in England and in this country to denote an indefinite failure of issue, and a limitation upon such terms, unqualified, is regarded as void for remoteness.* 2 Washb. Real Prop., marg. pp. 360, 361. But the courts often avail themselves of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time, and not an indefinite failure. *Id.*, marg. p. 362. "Slight circumstances are laid hold of as sufficient to indicate an intention that a limitation over on death without issue shall take effect at a definite time, to wit, on the death of the first taker." 2 Redf. Wills (3d Ed.), marg. p. 277, and note 51; Bedford's Appeal, 40 Pa. St. 18. The words "die without leaving issue surviving," or "leaving no issue or child," or "if he should leave no children," have been held to create a definite failure of issue. Nicholson v. Bettie, 57 Pa. St. 386; Hill v. Hill, 74 Pa. St. 173; Clapp v. Fogelman, 1 Dev. & B. Eq. 466; Wight v. Baury, 7 Cush. 105; Van Dyke v. Vanderpool, 14 N. J. Eq. 198; Fairchild v. Crane, 13 N. J. Eq. 105; Hull v. Eddy, 14 N. J. Law, 169; Eaton v. Straw, 18 N. H. 320; Hall v. Chaffee, 14 N. H. 215; Goodell v. Hibbard, 32 Mich. 47; Grier v. Griswold, 18 Ga. 550; Flinn v. Davis, 18 Ala. 132; Smith v. Harris, 16 Ga. 545.

In the case at bar the words are "die leaving no heirs." The word "heirs" may sometimes be construed to mean "children" or "issue" according to the context. Loveday v. Hopkins, 1 Amb. 273; Smith v. Harris, *supra*; Goodell v. Hibbard, *supra*; Griswold v. Hicks, 132 Ill. 494; 24 N. E. 63; Summers v. Smith, 127 Ill. 645; 21 N. E. 191. In the will now under consideration the word evidently means "children" because if the intention was to include heirs generally, the sisters of the testator, who were to take upon the happening of the contingency, being the

aunts of the daughter, might be included among her heirs. It could hardly have been the intention of the testator that her sisters should take in the event of her daughter dying without leaving these same sisters as her heirs. But, while the word "heirs" is here evidently intended to mean "*children*," it unquestionably refers to *children as the heirs of the devisee*. The word "heirs" is ordinarily used in wills to designate those persons who answer this description at the death of the testator. The word "heir," in its strict and technical import, applies to the person or persons appointed to succeed to the estate in case of intestacy. *Kellett v. Shepard*, 139 Ill. 433; 28 N. E. 751, and 34 N. E. 254. Those who succeed to the estate are those who are understood to be living at the time of the intestate's death. If this view be correct, the words "should the said Sarah Jane Spears die leaving no heirs," mean "should the said Sarah Jane Spears die leaving no children at the time of her death." This construction receives support from the fact that the persons who are to take in the event of the death of the daughter leaving no heirs were in existence at the time of the making of the will, and are mentioned by name. Mention of the sisters as being then alive, and the designation of two of them to take the care and the charge of the daughter, are facts which do not consist with the idea that those sisters were to take the estate if, at any time in the future, no matter how remote, the heirs of Sarah Jane Spears should become extinct. *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Daniel v. Thompson*, *Id.* 663; *Bullock v. Seymour*, 33 Conn. 289; *Hudson v. Wadsworth*, 8 Conn. 348.

In the recent case of *Summers v. Smith*, 127 Ill. 645; 21 N. E. 191, the language of the will was: "It is further my will, in case any of my sons," etc., "should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brother or brothers." It was held that, where the devise over is to the survivor or survivors of a class to which the first devisee belonged, it means a devise to a person in being at the death of the first devisee, and so relieves the devise over of objection on account of remoteness; and it was there said: "In the absence of anything appearing to the contrary, language

must be presumed to have been intended to have the legal effect which the law assigns to it. So, therefore, here, 'dying without heirs of body could only mean dying without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first devisee, as children,' etc. The rule, as announced by the English cases, is that a devise in fee, with a remainder over if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote and founded on an indefinite failure of issue. 4 Kent Comm., marg. p. 276. But section 6 of the Illinois conveyance act provides that "in cases where, by the common law, any person or persons might hereafter become seized, in fee tail of any lands, tenements or hereditaments, by virtue of any devise, gift, grant, or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance." 1 Starr & C. Ann. St., p. 571. Hence the same reasons for holding that the words "die leaving no heirs" refer to issue indefinitely or a failure of issue at any time, rather than to a failure of issue at the death, do not exist in this State, where we have no estates tail, as exist where, as at common law, estates tail are recognized. *Summers v. Smith, supra*. In *Voris v. Sloan*, 68 Ill. 588, the words "in case she should die without issue" occurring in a deed of trust, were construed to mean, "without having had issue;" so that, upon the birth of a child or children of the body, the contingency was fulfilled, and the fee vested in them, and the limitation over was defeated. But the plain and obvious meaning of the expression "should the said Sarah Jane Spears die leaving no heirs" or children is that she should die leaving no heirs or children at the time of her death. This construction accords with the grammatical relation of the words in the phrase, and with the common under-

standing of their import. *Williams v. Lewis*, 100 N. C. 142; 5 S. E. 435; *Hall v. Chaffee*, 14 N. H. 215.

The necessary result of this construction by which the words in question are held to import a definite, and not an indefinite, failure in issue, is that the devise to Sarah Jane Spears must be regarded as the devise of a fee determinable upon her dying without leaving children at the time of her death. *Summers v. Smith*, *supra*. It cannot be known until the death of Mrs. Dustan whether the contingency will happen by which the limitation over is to take effect. If she dies leaving no children at the time of her death, her mother's sisters will take the property; but, if she leaves a child or children at that time, such child or children will take the property as her heirs. It follows that appellant did not have such a fee-simple title as was called for by the contract, and the decree of the court below was right.

It is most strenuously contended by counsel for appellant that the words "*die leaving no heirs*" refer to the death of the devisee in the lifetime of the testatrix, and that, as she survived the testatrix, the fee simple vested in her. Several cases in New York and Pennsylvania are referred to which seem to sustain this view. But they are not applicable here, for the reasons involved in the observations already made. "When the death of the first taker is coupled with other circumstances, which may or may not ever take place—as, for instance, death under age or without children—the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, "upon death" under the circumstances indicated, at any time, whether before or after the death of the testator. *Britton v. Thornton*, 112 U. S. 526; 5 Sup. Ct. 591; *Buchanan v. Buchanan*, 90 N. C. 308; 5 S. E. 430; *Summers v. Smith*, *supra*; 11 Am. & Eng. Enc. Law, p. 919. *The language of the provisions in the will sustains the view that the death of the devisee in the lifetime of the testatrix was not intended.* The testatrix wills and directs that forty acres of land be sold, "and after discharging the above expenses," the balance shall become and be the property of my daughter. The "above expenses" included funeral expenses, which, of course, could not be incurred until after the

death of the testatrix. The last clause directs that "all of the above-described property shall be equally divided between my sisters" should the daughter die leaving no heirs. "All of the above-described property" includes the balance of the proceeds of the sale of the forty acres after paying funeral and other expenses, which balance could not exist until after the death of the testatrix; and, as the distribution to the sisters could not take place until after the death of the daughter, *the death of the daughter must have been contemplated as occurring after that of the testatrix*. We think, however, that the court below should have dismissed the bill without prejudice, so as to leave appellant to his remedy at law. The decree of the circuit court will accordingly be reversed, and the cause is remanded to that court, with directions to dismiss the bill without prejudice. REVERSED and remanded, with directions.

DEAN v. MUMFORD.

102 Mich. 510; 61 N. W. 7.

MONTGOMERY, J. Complainant, as one of the legatees named in the will of Horace M. Dean, filed this bill against the defendants Mumford and Frank Dean, executors, and the codefendants as legatees, asking a construction of the terms of the will, if held valid, and asserting that it is as a whole invalid, in equity. A preliminary question is raised as to the jurisdiction, it being claimed by defendants that, except at the suit of a trustee or *cestui que trust* who asks a direction as to the execution of a trust, a court of chancery has no jurisdiction to construe a will or declare any or all of its provisions invalid. But, however this may be, the executors have answered, in this case, and in terms submitted the question of construction of the will to the court. As it is undoubted that they might have invoked the jurisdiction of the court for that purpose by a bill, we think that, they having submitted the question, the court may properly maintain jurisdiction. *Sawtelle v. Ripley* (Wis.), 55 N. W. 156.

The material parts of the will are as follows: "First. I give

and bequeath to my beloved wife, Mary C. Dean, the use of the homestead now occupied by us, No. 83 State street, together with all the furniture and other personal property thereon and connected therewith, to be used and enjoyed by her during her natural life as a home *for herself, and for such of my children as shall remain unmarried, and shall be agreeable to her.* The taxes and repairs upon said homestead to be paid by my executors from my estate. Second. I also give and bequeath to my said wife the sum of fifteen hundred dollars per annum, to be paid to her quarterly or monthly by my executors, as she may desire, to be received, used, and enjoyed by her during her natural life. Third. All the rest, residue, and remainder of all the goods, chattels, real and personal estate of whatsoever kind or nature, or wheresoever the same may be situated, I desire to be divided equally between my five children,—Edgar S., aged 38; Arch. H., aged 30; Herbert L., aged 28; Frank, aged 26; and Lizzie, aged 23,—or to the survivors of them, excepting in case any of them shall die leaving child or children surviving. Then, in such case, the respective interests of my sons and daughters above named shall go to and belong to the child or children surviving them, respectively. Fourth. Whereas I have advanced to my sons Edgar S. and Arch. H. certain sums of money, which will appear charged to them upon my books, and if I should advance to them or either of them, or others of my children, during my lifetime, other sums, all such sums in money or property which I shall advance to or pay for and shall charge to them, respectively, shall be deducted from the respective portions above designated to go to my said children. *Fifth. I hereby will and direct that the portions hereinbefore designated for my said sons Edgar S., Arch. H., and Herbert L., be held in trust by my executors, as trustees for my said sons, their wives and children, and the interest, income, and profit thereof be used and paid as in the judgment of my said executors shall be best for the support and maintenance of my said three sons, their wives and children, during the lives of my said sons and their wives; and upon the decease of my said sons and their wives the portion so held in trust by my said executors shall become the property of and go to the child or chil-*

dren of said sons, severally, and their heirs and assigns forever."

It is the contention of complainants—First, that the first and second clauses make the taxes and repairs and annuity a charge upon the estate, and create a trust in favor of the widow which continues during her life; and, second, that, if this be not so held, then under any construction which may be given to the fifth clause, the power of alienation is suspended for a longer period than during two lives in being, and that for this reason the trust created in the fifth clause falls.

The defendants contended—First, that inasmuch as the widow has elected to take under the statute, and not under the will, the validity or nonvalidity of the will should be determined without reference to the intended provision for her; second, it is contended that the power of alienation was not, by the terms of the will, suspended, during the life of the widow; and, third, that by the proper construction of the fifth clause, in connection with the third and fourth clauses, of the will, the power of alienation is not suspended, as to any portion of the estate which vested after the death of the widow, for a longer period than two lives in being.

We think, if the power of alienation was not suspended during the life of the widow, the case presents no very serious difficulty. It appears to be conceded by counsel who seek to maintain the validity of the will and its provisions that the fifth clause restrains alienation for the period of two lives in being. The construction of the will for which they contend is that, under the provisions of the third clause, the estate is to be divided into five equal shares, that two of the shares—those devised to Frank and Lizzie—vest at once; that, by the terms of the fourth clause, certain advancements are to be taken out of the shares of Edgar S. and Arch. H., and the remainder is, in each instance, as in the case of the one-fifth instance of Herbert L., to be held in trust by the executors for the respective legatees named their wives and children; and that upon the decease of Edgar S., and his wife Eliza, the one-fifth less the deducted advancements, becomes the property of their children; and so in the case of Arch. H. and Herbert L. We think this contention is sound, so far as it relates to the third and fifth clauses,

if it be held that there was no restraint or alienation during the life of the widow. It was very plainly the purpose of the testator to divide his estate into five equal parts, and we think it very clear that it was not the intention to provide by the fifth clause that the three parts which had been set apart by the third clause of the will to Edgar S., Arch. H., and Herbert L. should be held in trust for the common use of the sons, their wives and children. But it is suggested that, in this view, as Herbert L. was unmarried at the time the will took effect, the will should be construed to relate to any wife whom he might in the future marry; and, so construed, it would not vest in the children or heirs until after the expiration of two lives in being. We think the will not open to this construction, but that it was intended to mean any wife of Herbert L. living at the time of the decease of the testator. *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60. The will should not be given a construction for the purpose of defeating the intention of the testator, which would bring within its purview one who should in the future become the wife of one of the legatees.

The important question, then, as it appears to be conceded, is whether the power of alienation was suspended during the life of the widow. If the contention of defendants' counsel, that the election of the widow to take under the statute calls for a construction of the will as it would have read without any attempt to make provision for her, be allowed, this, with what we have above determined, would be an end of the case. A statement is found in the case of *Bailey v. Bailey*, 97 N. Y. 470, sustaining the contention of defendant's counsel. But in that case it had been determined in the opinion that the bequest of the widow was of a life estate in the property, which she had the right to sell if she chose; so that the statement affirming the doctrine here contended for was *dictum*. We cannot accept this as a correct statement of law. The will must, it seems to us, be construed as made. It will not do to say that provisions which are incorporated in a will, and which are not valid when made and when the will takes effect, can thereafter be made valid by the election of the widow. This would, in effect, empower the widow to execute a will by validating what was previously no will. Counsel also cite, as sustaining this contention,

In *re* Woodburn's Estate (Pa. Sup.), 25 Atl. 145; *Small v. Marburg* (Md.), *Id.* 920; and *Tracy v. Murray*, 44 Mich. 109; 6 N. W. 224. In the cases of *In re* Woodburn's Estate and *Small v. Marburg* the question before the court related to the effect of the election of the widow to take under the statute upon the distribution to be made of the estate. Neither case deals with the question of whether the widow can, by declining to take under the will, make that valid which was before invalid, nor was any such question before the court. In *Tracy v. Murray* the widow renounced her right to take under the statute, and elected to take under the will. The court say: "Accepting as correct the doctrine of those cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provisions of the will after her husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation, if not paid, would simply become a claim against the estate, and take its place, when proven against the estate, with the other allowed claims. The husband during his lifetime, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seised, makes an offer therefor which is not to be submitted to her for acceptance until after his decease." This case, it will be seen, presented no question of validating invalid provisions of the will, but dealt with the rights of the widow as they existed under the will as made by the deceased; and the case certainly contains no intimation which sustains the contention here made.

Were these taxes and annuity a charge upon the estate in such a sense as to create a trust, and suspend the power of alienation? It is settled that no express words creating a trust are requisite, if the intent to devote the estate to a particular purpose is apparent from the terms of the will. Where a duty is imposed upon the executor which makes it necessary for him to retain the possession, continually, of realty, he will take an interest adequate to enable him to perform this duty; and an alienation which cuts off that right is, by implication, prohibited. Perry Trusts, §§ 121, 213, and cases cited; Cummings v. Corey, 58 Mich. 494; 25 N. W. 481; Vail v. Vail, 7 Barb. 226. And where there is a provision in the will that certain debts and

charges are to be paid, and the residue of the estate not thus expended is then divided, the particular debts, legacies, and charges will be considered a charge against the estate, real and personal. See a discussion of this rule in 2 Jarm. Wills, p. *1411 *et seq.*; *Greville v. Browne*, 7 H. L. Cas. 689; *Gainsford v. Dunn*, L. R. 17 Eq. 405; *Lafferty v. Bank*, 76 Mich. 35; 43 N. W. 34. It will be noticed in the present case that the will, after bequeathing the homestead, makes the taxes and repairs upon the homestead payable from the estate of the testator. It also provides for an annuity of \$1,500 per annum, to be paid by the executors during the natural life of the widow, and then bequeaths all the rest, residue, and remainder of all the goods, chattels, real and personal estate, to the five children named. We think the intention is clearly manifested to make the entire estate, real and personal, subject to these charges, and the executors may devote the income of the estate, both real and personal, to that purpose, and are required to do so if necessity therefor exists. *This attempted restraint on alienation must be held void.*

The question is raised as to whether the will is void in toto. We think not. Certain duties are imposed upon the executors which might, notwithstanding the failure of the limitation in the fifth clause, be performed, and the provisions charging against the shares of Edgar S. and Arch. H. the amount of certain advancements should be sustained. As the widow has elected to take under the statute, it is not material to determine whether, upon the failure of the limitation in the fifth clause, the children would take an absolute fee under the third clause, as their interest would be the same whether they take as heirs at law or by the terms of the will. A decree will be entered in accordance with these views. The costs will be paid out of the estate. The other justices concurred.

CHAPTER VII.
LIMITATIONS TO CLASSES OF PERSONS.*

*See Secs. 1482-1485, Vol. 10, Cyclopedic of Law, and *cases there cited*.

CHAPTER VIII. OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE*.

The Freehold Estates of Dower and Curtesy.

HOUSE v. JACKSON.

50 N. Y. 161. 1872.

PECKHAM, J. *The statute declaratory of the common law enacts that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage: 1 R. S. 740, § 1.*

It is not necessary that the husband should have been seized of a fee simple absolute, to enable the wife to have dower. If he was seized of an estate in tail male, or of the heirs of his body, she shall have dower: Lit., § 53, 40, a; Com. Dig., title Dower, A. 6.

“Thus, generally, in every case where the issue which the husband may have by his wife by possibility may inherit, his wife shall be endowed:” Com. Dig., title Dower, A. 6; Park on Dow. 79; Perk., § 301; Lit., § 52.

So, where the husband is seized of a base or conditional fee, or of a fee with a determinable quality attached to it, she has dower.

The dower will attach subject only, when the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband: Park on Dow. 49; Ib. 37.

So, if the husband have a defeasible estate in fee tail, his wife shall be endowed till his estate be defeated: Com. Dig. Dower, A. 6, and cases cited.

So, her dower terminates, if the conditional or base fee be

*See Secs. 1486-1502, Vol. 10, Cyclopedia of Law.

ended, and the grantor enter for condition broken: *Beardslee v. Beardslee*, 5 Barb. 324.

"The seisin must be of an estate of inheritance, conferring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations:" Park, 47.

Seisin of a vested remainder is not sufficient to give dower. So plain a point is decided in this Court: *Durando v. Durando*, 23 N. Y. 331.

I see no objection to the merger of this life estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of *Moore v. Littel*, 41 N. Y. 66. This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again, and the widow is then not entitled to dower.

Moore v. Littel holds the estate of the son, prior to the death of the father, to be a vested remainder; the son was also seized in fact and in law of his father's life estate, and then became seized of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge: Park, 191.

The rule is adopted in much broader language in our statute: 1 R. S. 742, § 16.

At common law there might have been an intermediate estate for years and yet the wife had dower—as estates for years were not highly regarded at common law. But *cessit executio* during the term: Com. Dig. Dower, A. 6; Perk., § 336.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (*Ib.*), though the surrender be upon condition, for the estate is gone until the condition be broken: *Ib.*

In this case there is no intervening estate. The husband is seized of the life estate in fact and in law, and he is also seized

of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seisin as prevents the alienation of the estate or its incumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father, her dower becomes absolute. The decree must be modified according to these views, with costs to her—no costs to either of the others, and the cause remitted for further proceedings.

Judgment modified in accordance with opinion, and affirmed as modified.

IN RE RAUSCH.

Supreme Court of Minnesota, 1886.

35 Minn. 291.

MITCHELL, J. Assuming the instrument (Exhibit A) to be in terms sufficient, if valid, to effect such a result, the question in this case is whether a married woman can, by contract with her husband, release and relinquish to him her incipient or inchoate interest as wife in his real estate, so as to exclude her, as widow, from dower. We use the term "dower" because although "dower," strictly so-called, no longer exists in this State, yet the provisions of the present statute for the widow in the real estate of her deceased husband are rather in the nature of an enlargement than an abolishment of dower, and this inchoate right, under the statute, is of the same general nature as the inchoate right of dower at common law. It was a well-established rule of the common law that a wife could not relinquish her dower in the real estate of her husband by executing a release to him: 2 Scrib. Dower, 309. It is true that in equity deeds of separation of husband and wife, made through the agency of a trustee for the wife, would be enforced if their object was actual and immediate, and not contingent or future separation, and, if so provided in them, might exclude her from dower and distribution in her husband's estate: Cord, Rights Marr. Wom., § 114 *a*, *et seq.* But, whatever may have been the rule in equity, the power of the wife, even by a deed of separa-

tion, to release to her husband her inchoate statutory right in his real estate is excluded in express terms by the statute, which declares that "no contract between a husband and wife, the one with the other, relative to the real estate of either, or any interest therein, shall be valid:" Gen. St. 1878, c. 69, § 4. The inchoate interest of the wife in the real estate of the husband, while it is not an estate, or even a vested interest, yet is a valuable, although contingent, interest in real estate, and a release of it is "a contract relative to an interest therein," within the meaning of the statute.

As the husband died testate as to all his property, his widow would not, in any event, be entitled to any allowance or distributive share out of his personal property: Gen. St. 1878, c. 51, § 1; *Johnson v. Johnson*, 32 Minn. 513 (21 N. W. Rep. 725). Hence it becomes unnecessary to consider whether this release would have excluded respondent from distribution had her husband died intestate.

The judgment of the Court below must therefore be affirmed wherein it adjudges respondent entitled to an assignment of her statutory rights in the real estate, but reversed wherein it adjudges her entitled to the statutory allowance out of the personal property of her husband.

Ordered accordingly.

Effect of Divorce on Dower.

VAN CLEAF v. BURNS.

118 N. Y. 549; 23 N. E. 881.

Appeal from supreme court, general term, second department, affirming a judgment entered upon the decision of the court at special term.

The plaintiff brought this action to recover dower in certain lands situate in the city of Brooklyn, of which one David Van Cleaf, deceased, was seised while he was her husband. She alleged in her complaint that she was married to said Van Cleaf on the 6th of July, 1875, and that he died November 12, 1884; that during said period he was seised and possessed of the

premises in question, and that the defendants are in possession thereof, claiming to own the same. Without denying any of said allegations, the defendant Catherine Burns answered, alleging that on the 9th of April, 1881, said David Van Cleaf, who was then a resident of the State of Illinois, was duly divorced from the plaintiff, on account of her misconduct, by the judgment of a court in that State which had jurisdiction of the subject-matter and of the parties. The trial court found the following facts: "That in an action in the circuit court of Cook County, Ill., in which David Van Cleaf was plaintiff, and said Mary B. Van Cleaf was defendant, brought for a divorce and dissolution of the marriage for the cause and ground that said Mary B. Van Cleaf had willfully deserted and absented herself from said David Van Cleaf, her husband, without any reasonable cause, for the space of more than two years before the commencement of such action, which by the laws of Illinois was a ground for absolute divorce and dissolution of the bond of marriage, such proceedings were had that on April 9, 1891, judgment was granted and perfected therein in favor of said David Van Cleaf against said Mary B. Van Cleaf, dissolving the bond of marriage between them for the cause and ground aforesaid, which cause and ground was by said judgment adjudged to exist. That said court, in pronouncing said judgment, had jurisdiction of the subject-matter of the action and judgment, and of the parties thereto. That said David Van Cleaf was at the time of said action and judgment domiciled in Chicago, in the State of Illinois; and said Mary B. Van Cleaf, on October 18, 1880, appeared in said action in person, and filed her answer in writing to the complaint, having just received notice of the commencement of the suit by the service on her in this State of the summons and complaint. That the plaintiff was during all the time above mentioned a resident of the city of Brooklyn, in the State of New York." The court found, as a conclusion of law, that the complaint should be dismissed upon the merits, with costs, to which the plaintiff duly excepted. The only proof given by either party on the trial was a stipulation admitting the facts as found. The case states that no other facts appeared; and the parties stipulate, for the purpose of any appeal, that David Van Cleaf was seised in fee-simple of

the premises in question between the date of his marriage to the plaintiff and the date of said divorce, and that such admission shall have the same effect as though found by the trial judge upon proper evidence.

VANN, J. (after stating the facts as above). Our Revised Statutes provide that "a widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage" (1 Rev. St., p. 740, § 1); but that, "in case of divorce dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed" (*Id.*, p. 741, § 8). It is further provided by the Code of Civil Procedure that, where final judgment is rendered dissolving the marriage in an action brought by the wife, her inchoate right of dower in any real property of which her husband then was, or was theretofore, seised, shall not be affected by the judgment; but that, when the action is brought by the husband, the wife shall not be entitled to dower in any of his real property, or to a distributive share in his personal property. Sections 1759, 1760. These provisions of the Code replaced a section of the Revised Statutes which provided that "a wife, being a defendant in suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." 3 Rev. St. (6th Ed.), p. 157, § 61, repealed Laws 1880, c. 245, § 1, subd. 4. An absolute divorce could be granted only on account of adultery, either under the Revised Statutes or the Code. 3 Rev. St. (6th Ed.), p. 155, §§ 38-42; Coke Civil Proc., §§ 1756, 1761. According to either, an action could be brought to annul, to dissolve, or to partially suspend the operation of the marriage contract. A marriage may be annulled for causes existing before or at the time it was entered into; and the decree, in such cases, destroys the conjugal relation *ab initio*, and operates as a sentence of nullity. *Id.*, §§ 1742, 1754. A marriage contract may be dissolved, and an absolute divorce, or a divorce proper, granted for the single cause already mentioned. Such a judgment operates from the date of the decree, by relieving the parties from the obligations of the marriage, although the party adjudged to be guilty is forbidden to remarry until the

death of the other. It has no retroactive effect, except as expressly provided by statute. *Wait v. Wait*, 4 N. Y. 95. An action for a separation, which is sometimes called a "limited divorce," neither annuls nor dissolves the marriage contract, but simply separates the parties from bed and board, either permanently or for a limited time. Code Civil Proc., §§ 1762-1766. Neither the nature nor effect of the judgment of divorce granted by the court in Illinois in favor of David Van Cleef against the plaintiff appears in the record before us, except that the bond of marriage between them is stated to have been dissolved upon the ground that she had willfully deserted and absented herself from her husband, without reasonable cause, for the space of more than two years prior to the commencement of the action. It does not even appear that the decree would have the effect upon her right to dower in the State where it was rendered that is claimed for it here. Apparently, it simply dissolved the marriage relation; and whether it had any effect, by retroaction, upon property rights existing at its date, is not disclosed. A judgment of a sister State can have no greater effect here than belongs to it in the State where it was rendered. *Snydam v. Barber*, 18 N. Y. 468. There is no presumption that the statutes of the State of Illinois agree with our own in relation to this subject. *Cutler v. Wright*, 22 N. Y. 472; *McCulloch v. Norwood*, 58 N. Y. 562. If they do, the fact should have been proved, as our courts will not take judicial notice of the statutes of another State. *Hosford v. Nichols*, 1 Paige, 220; *Chanoine v. Fowler*, 3 Wend. 173; *Sheldon v. Hopkins*, 7 Wend. 435; *Whart. Ev.*, §§ 288, 300. Adequate force can be given to the Illinois judgment, by recognizing its effect upon the status of the parties thereto, without giving it the effect contended for by the respondent. *Barrett v. Failing*, 111 U. S. 523; 4 Sup. Ct. Rep. 598; *Mansfield v. McIntyre*, 10 Ohio, 27.

The judgment appealed from, therefore, can be affirmed only upon the ground that a decree dissolving the marriage tie, rendered in another State, for a cause not regarded as adequate by our law, has the same effect upon dower rights in this State as if it had been rendered by our own courts adjudging the party proceeded against guilty of adultery. This would involve as a result that the expression, "misconduct of the wife," as used

in the Revised Statutes, means any misconduct, however trifling, that by the law of any State is ground for divorce. Thus it might happen that a wife who resided in this State, and lived in strict obedience to its laws, might be deprived of her right to dower in lands in this State by a foreign judgment of divorce, based upon an act that was not a violation of any law of the State of her residence. It is important, therefore, to determine whether the provision that a wife shall not be endowed in case of divorce dissolving the marriage contract for her misconduct refers only to that act which is misconduct authorizing a divorce in this State, or to any act which may be termed "misconduct," and converted into a cause of divorce by the legislature of any State. In *Schiffer v. Pruden*, 64 N. Y. 47, 49, this court, referring to said provision of the Revised Statutes, said that "the misconduct there spoken of must be her adultery; for there is no other cause for a divorce dissolving the marriage contract." It had before said, in *Pitts v. Pitts*, 52 N. Y. 593, that "a wife can only be barred of dower by a conviction of adultery in an action for divorce, and by the judgment of the court in such action." While these remarks were not essential to the decision of the cases then under consideration, they suggest the real meaning and proper application of the word "misconduct," as used in the Revised Statutes, with reference to its effect upon dower. When the legislature said, in the chapter relating to dower, that a wife should not be endowed when divorced for her own misconduct; and, in the chapter relating to divorce, that she should not be entitled to dower when convicted of adultery—the sole ground for a divorce,—we think that, by misconduct, adultery only was meant, or that kind of misconduct which our laws recognize as sufficient to authorize a divorce. The sections relating to dower, and to the effect of divorce upon dower, are *in pari materia*, and should be construed together; and, when thus construed, they lead to the result already indicated. *Beebe v. Estabrook*, 79 N. Y. 246, 252. The repeal of section 48, which provided that the wife, if convicted of adultery, should not be entitled to dower, has not changed the result, as sections 1759 and 1760 of the Code have been substituted, leaving the law unchanged. They enact in effect, that when judgment is rendered at the suit of the husband dissolv-

ing the marriage for the adultery of the wife, she shall not be entitled to dower in any of his real property. There is no change in meaning; and the slight change in language, as the commissioners of revision reported, was to consolidate and harmonize the new statute with the existing system of procedure. Throop Anno. Code, § 1760, note. The repealed section was pronounced in the Ensign Case, 103 N. Y. 284; 8 N. E. Rep. 544, "an unnecessary and superfluous provision as respects dower." It was also held in that case that while the relation of husband and wife, both actual and legal, is utterly destroyed by a judgment of divorce so that no future rights can thereafter arise from it, still existing rights, already vested, are not thereby forfeited, and are taken away by only special enactment as a punishment for wrong. It follows that depriving a woman of her right to dower is a punishment for a wrongful act perpetrated by her. Is it probable that the legislature intended to punish as a wrong that which it had not declared to be wrong? If a divorce granted in another State for willful desertion relates back so as to affect, by way of punishment, property rights previously acquired, must not a divorce for incompatibility of temper, or any other frivolous reason, be attended with the same result? Does the penalty inflicted upon the guilty party to a divorce granted in this State for a single and special reason attach to any judgment for divorce, granted in any State for any cause whatever, including, as is said to be the law in one State, the mere discretion of the court? *Our conclusion is that as nothing except adultery is, in this State, regarded as misconduct with reference to the subject of absolute divorce, no other misconduct is here permitted to deprive a wife of dower, even if it is the basis of a judgment of divorce lawfully rendered in another State, unless it expressly appears that such judgment has that effect in the jurisdiction where it was rendered, and as to that we express no opinion. The judgment should be reversed, and a new trial granted, with costs to abide event. All concur, except Follett, C. J., dissenting.*

Curtesy.

FERGUSON v. TWEEDY.

43 N. Y. 543. 1871.

FOLGER, J. This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his lifetime an estate as tenant by the curtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. *To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seisin, during marriage, of the premises in question. There is no dispute but that all of these existed, save the last.*

It is a general rule that to support a tenancy by the curtesy there must be an actual seisin of the wife: *Mercer's Lessee v. Selden*, 1 How. U. S. 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seisin, so as to entitle the husband to a life estate in the land as a tenant by the curtesy, though he has never received or demanded rent during the life of his wife: *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife: 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry: 8 Paige, *supra*. And it has been held that where the wife takes under a deed and there is no adverse holding at the time that actual entry is not necessary: *Jackson v. Johnson*, 5 Cow. 74. But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife she did convey by quit-claim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his assign held the possession up to her death and afterward. It is true that this deed was one of two interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed as it was, by possession in severalty, was valid and sufficient to sever the possession for the lifetime of the testator's

wife: *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 21.

And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession and right of such possession for a term which ran for her life. There was then an outstanding estate for life in the premises which, beginning before her coverture began, did not end until her coverture ended. And it is settled that if there be an outstanding estate for life the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture: *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Cregier*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned Justice before whom the action was tried that the possession of the grantee in that deed and of his assign was actual and exclusive. It is found, also, that neither the wife of the testator nor the testator himself did at any time after the execution of the deed have actual possession of the premises or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the curtesy in favor of the testator.

This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the Court below should be **AFFIRMED** with costs to the respondent.

THORNTON'S EXECUTORS v. KREPPS.

37 Pa. St. 391. 1860.

A. devises land to B. and her heirs forever; provided, however, that if B. should die without issue living, then the estate should revert to A. B. marries and has a child, which dies, and then B. dies without issue living. The executors of A. claim that the land then reverted to A.'s estate; but B.'s husband claims curtesy therein. Does he have it?

Held, that on the death of B. the land would revert to A.'s estate, subject to the right of curtesy, which attached as an initiate right during coverture and became consummate on the death of the wife.

LOWRIE, C. J. The incidents of an estate do not depend upon the intention of the grantor of it; but are engrafted on it by law, and, generally at least, without any regard to the intention of the grantor, and even in disregard of it. Our inquiry, therefore, is not after the intention of the testator relative to the claim of curtesy, but for the character of the estate intended to be granted by him, and whether curtesy is an incident in law to such an estate.

What, then, is the character of this estate as given by the will? It is not an estate tail, because the devise does not propose to limit the descent of it to the issue of the devisee. It is a fee simple subject to an executory devise—that is, a conditional limitation by will, which defeats it and substitutes another estate in its stead, if the devisee should die *both* under age and without issue then living: *Smith's Executory Interests*, §§ 148-151; 4 *Casey*, 108.

Does the common law give the husband of the devisee curtesy of such an estate after it has been defeated by the happening of the conditions? We think it does.

The case of *Buchanan v. Shaffer*, 2 *Yeates*, 374, decides this on the authority of *Buckworth v. Thirkell*, though possibly the case might have been decided in the same way on other grounds. The principle of this latter case has been very ably attacked and defended in the argument here, and we shall not repeat the discussion. In favor of the principle we have *Kent* (4 *Com.*

32, 8th ed.) ; Roper (1 Husband and Wife, 38—43), and Preston (3 Abst. of Title, 372, 384) ; and against it, we have Butler (note 170 to Coke on Littleton, 241 *a.*) ; and Park (Dower, 163-191). Roper on one side and Park on the other go very fully into the discussion of the authorities and the principle. Its supporters go on the substance of the principal estate, and its assailants on the form of its creation ; and, owing to the innumerable variety of the forms of expression in which the same substantial estate may be created, we think it much more certain to attach the incidents to its substance than to the form of its creation.

On a subject that involves so many difficult questions we confine ourselves carefully to the case before us, and say that curtesy attaches to an estate in fee—that is, subject to a conditional limitation on the failure of issue.

The case is not affected by the Married Woman's Act of 1848, for that expressly retains the curtesy estate as it existed before.

JUDGMENT AFFIRMED.

CHAPTER IX.
OF JOINT TENANTS AND TENANTS IN COMMON.*

*Meaning of an Estate in Joint Tenancy.***

THORNBURG v. WIGGINS.

135 Ind. 178; 34 N. E. 999. 1893.

DANLEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886,

*See Secs. 1503-1507, Vol. 10, Cyclopedia of Law.

**See Sec. 1503 et seq., Vol. 10, Cyclopedia of Law.

levy said execution on said real estate, or on the one-half interest in value thereof, taken as property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. *A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But*

the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy. Griffin v. Lynch, 16 Ind. 396.

The 9th Am. and Eng. Ency. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally * * * they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seised not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seised of the whole, and each being seised of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. * * * Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole, the estate is inseparable—cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *David v. Clark*, 26 Ind. 424.

Strictly speaking, estates by entireties are not joint tenancies. *Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412. The husband and wife being seised not of moieties, but both seised of the entirety *per tout* and not *per my*. *Jones v. Chandler*, 40 Ind. 588; *Davis v. Clark, supra*; *Arnold v. Arnold, supra*.

It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their material relation referred to. *Morrison v. Seybold*, 92 Ind. 298; *Hadlock v. Gray*, 104 Ind. 596; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow, supra*; *Chandler v. Cheney, supra*.

But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations, in the conveyance, which clearly indicate the creation of a different estate. *Hadlock v. Gray, supra*; *Edwards v. Beall*, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the courts of some States have held that married women's acts, extending their rights, destroyed estates by entirety, but this court holds otherwise. *Carver v. Smith*, 90 Ind. 222.

And the greater weight of authority is in its favor. Our decisions hold that neither, alone, can alienate such estate. *Jones v. Chandler, supra*; *Morrison v. Seybold, supra*.

There can be no partition. *Chandler v. Cheney, supra*.

A mortgage executed by the husband alone is void. *Jones v. Chandler, supra*.

And the same is true of a mortgage executed by both to secure a debt of the husband. *Dodge v. Kinzy, supra*.

And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it. *State ex rel. v. Kennett*, 114 Ind. 160.

A judgment against one of them is no lien upon it. *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *McConnell v. Martin*, 52 Ind. 434; *Othwein v. Thomas*, 13 N. E. Rep. 564.

Upon the death of one, the survivor takes the whole in fee. *Arnold v. Arnold, supra*.

The deceased leaves no estate to pay debts. *Simpson v. Pearson, Admr.*, 31 Ind. 1.

And, during their joint lives, there can be no sale of any part on execution against either. *Carver v. Smith, supra*; *Dodge v. Kinzy, supra*; *Hulett v. Inlow, supra*; *Chandler v. Cheney, supra*; *Davis v. Clark, supra*; *McConnell v. Martin, supra*; *Cox's Admr. v. Wood*, 20 Ind. 54.

The statutes extending the rights of married women have no effect whatever upon estates by entirety. *Carver v. Smith, supra*.

Such estate is, in no sense, either the husband's or the wife's separate property. The husband may make a valid conveyance

of his interest to his wife, because it is with her consent. *En-year v. Kepler*, 118 Ind. 34.

The rule that husband and wife take by entirety was enacted in this territory in 1807, nine years before Indiana was vested with Statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922, R. S. 1882, provides that "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

Under a statute of the State of Michigan, similar in all its essential qualities to our own, the court held that "Where lands are conveyed, in fee to husband and wife, they do not take as tenants in common." *Fisher v. Provin*, 25 Mich. 347.

They take by entirety; whatever would defeat the title of one would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 371.

They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest, neither can be said to own an undivided half. *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *Allen v. Allen*, 47 Mich. 74.

While the rule of entirety was predicated upon a fiction, the legislative intent, in this State, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entirety have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, *supra*.

"Where a rule of property has existed for seventy years and

is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge, in some particulars, the separate power of the wife, which existed already under the acts of 1852 and the year following. * * * 'It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common.''' Carver v. Smith, *supra*.

In Chandler v. Cheney, *supra*, the court says: "It was a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate of joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Preston on Estates, 132; 2 Blackstone's Com., Sherwood's note; 4 Kent's Com., side page 363; 1 Bishop on Married Women; Freeman on Co-Tenancy, § 72; Fladung v. Rose, 58 Md. 13 (24).

"And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stewart on Husband and Wife, §§ 307-310; Tiedeman on Real Property, § 244.

"And as by common law it was competent to make husband

and wife tenants in common by proper words in the deed or devise," etc. *Hoffman v. Stigers*, 28 Ia. 310; *Brown v. Brown*, 32 N. E. Rep. 1128.

"So it seems that husband and wife may, by express words, be made tenants in common by gift to them during coverture." *McDermott v. French*, 15 N. J. Eq. 80.

In *Haddock v. Gray*, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But which the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

The court then adopts the language of Washburn, *supra*, and Tiedeman, *supra*.

In *Edwards v. Beall*, *supra*, the court held that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same

words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties—joint tenancy would be superseded or put in abeyance by the estate created by law-tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression “convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy.”

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution. Freeman on Ex. 125.

Judgment reversed, with instructions to the circuit court to SUSTAIN the DEMURRER to each paragraph of the complaint.

*What is Meant by Tenants in Common.**

CARVER v. FENNIMORE.

116 Ind. 236. 1888.

MITCHELL, J. Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defend-

*See Sec. 1507, Vol. 10, Cyclopedia of Law.

ant was indebted to her in a specified sum for the one-third of the profit, use, and occupation of a certain lot or tract of land in the town of Alexandria, in Madison County.

Issues were made which were tried by a jury, who returned a verdict for the defendant.

The questions for decision will be understood by the following statement of facts: In 1857 Ira K. Carver, the plaintiff's husband, was the owner of eighty acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted suit in the Madison Circuit Court against William Carver and about twenty others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the Circuit Court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title to, and right to the immediate possession of, the undivided one-third of all the lands so conveyed, and for \$125 damages against William Carver. An appeal was taken to this Court, where the judgment was afterward affirmed on the 16th day of October, 1884: *Carver v. Carver*, 97 Ind. 497.

William Perry owned the lot, for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit Perry conveyed by warranty deed to Mrs. Fadley, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this Court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land, and if he is, whether or not

the rental value is to be estimated according to the condition of the land prior and without reference to the improvements placed thereon by his grantor pending the suit, or whether he must account for the value of the use of the land with the improvements?

On behalf of the appellant it is contended that the only defense the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former suit determined all questions as to the value of the improvements upon the real estate.

It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land, and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case. The effect of the decree in the former suit was to declare and conclusively establish the fact that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate, but the rights and obligations of the co-tenants, as such, in respect to the improvement or enjoyment of the common estate, had not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, i. e., no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits: Rapalje & Lawrence Law Dict., tit. "Tenancy in Common."

That one tenant may exclude the other from or deny his title to the common estate does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common, nor does a decree establishing

and quieting the title of the excluded tenant necessarily determine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect to improvements made in good faith by the occupying tenant: *Carver v. Coffman*, 109 Ind. 547.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate.

Notwithstanding the statute, § 288, R. S. 1881, which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is that a co-tenant can only be compelled to account in case he has actually received rents from a third person, or when he has entered upon and held exclusive possession of the whole estate in hostility to and to the exclusion of his co-tenant: *Humphries v. Davis*, 100 Ind. 369, and cases cited; *Carver v. Coffman*, *supra*, and cases cited; *Osborn v. Osborn*, 62 Texas, 495; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Early v. Friend*, 16 Gratt. 21 (78 Am. Dec. 649, and note); *Kean v. Connelly*, 25 Minn. 222 (33 Am. Rep. 458).

It appears that the appellee and his grantors occupied the whole estate, denied the right of the appellant and contested her claim to an interest in the common property. She is, therefore, entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in controversy: *Freeman Co-Tenancy and Par.*, §§ 275, 277.

The instructions of the Court relevant to the features of the case above considered were substantially in consonance with the foregoing conclusions.

In refusing an instruction asked by the appellant and in the admission of evidence, the Court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon by the occupying claimants. This, the appellant contends, was an erroneous theory. The action by one co-tenant against another for an accounting for rents is a liberal and equitable action, and

equitable defenses may be made, and in such a case, if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession.

The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the *bona fide* occupant, or by his grantor from whom he purchased: *Morrison v. Robinson*, 31 Pa. St. 456; *Pickering v. Pickering*, 63 N. H. 468.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority: *White v. Stuart*, 76 Va. 546, 567; *Early v. Friend*, *supra*.

The defendant, and his grantor, who made the improvements, went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name as well as that of her husband appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon the institution of the suit by the plaintiff, notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857, nor were they bound to have the property lie idle, unproductive and unimproved, or take the chance of paying an enhanced value for the improvements which resulted from their own enterprise: *Ford v. Knapp*, 102 N. Y. 135 (55 Am. Rep. 782).

This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled

to compensation for improvements so made, he is, nevertheless, entitled to have them considered when called to account in an equitable action for rents and profits.

There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements in any other proceeding than the present is not here considered nor determined. These considerations lead to an affirmance of the judgment.

JUDGMENT AFFIRMED, with costs.

CHAPTER X.

WHAT PASSES WITH A GRANT OF LAND.*

*The Term "Land" Includes Everything Permanently
Attached to it.***

MOTT V. PALMER.

1 N. Y. 564. 1848.

RUGGLES, J. In December, 1841, Mott conveyed to Palmer a farm of land in Columbia County by a deed containing the following covenant:

"And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance."

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which stood on the land when the deed was executed, but which did not belong to Mott the grantor. The facts were, that the fence was erected on Mott's land in 1840 by one Brown (who owned the adjoining land), under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land; with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a justice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the

*See Secs. 1508-1515, Vol. 10, Cyclopædia of Law.

**See Sec. 1508 et seq., Vol. 10, Cyclopædia of Law.

Court below and rejected by the Court, it was afterward given by the defendant Mott.

The question now is whether in this action brought by Palmer the grantee against Mott his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey everything described in his deed; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, County of Columbia, bounded, etc., with the appurtenances," etc. The word land, when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, and fences upon it: *Goodrich v. Jones*, 2 Hill, 143; *Walker v. Sherman*, 20 Wend. 639, 640, 646; *Green v. Armstrong*, 1 Denio, 554; *Com. Dig. Grant, E.*; *Co. Litt.* 4 a; 2 Roll. 265. A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the grantee unless the reservation be in writing: *Noble v. Bosworth*, 19 Pick. 314. If the fence had belonged to Mott, it would have passed by his deed; not by force of the word *appurtenances* contained in the deed, but without that word, and as part of the land. Trees, buildings, fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seisin, like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the

inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and, therefore, it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees, and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another: *Shep. Touch.* 206; 1 *Inst.* 48, b. And it is a corporeal inheritance: 10 *Vin.* 202. Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord: *Holmes v. Tremper*, 20 *John.* 30; *Miller v. Plumb*, 6 *Cowen*, 665; *Doty v. Gorham*, 5 *Pick.* 489. *Herlakenden's Case*, 4 *Co. R.* 63, affords an instance in which one man owned the land and another the growing trees upon it. In *Rogers v. Woodbury*, 15 *Pick.* 156, *Putnam, J.*, in speaking of a house which a man had erected on land which did not belong to him, said "it might or it might not be parcel of the realty. If the owner of the land owned the buildings, it would be so. If he did not, and the owner of the building had no interest in the land, the building would be personal property." *Smith v. Benson*, 1 *Hill*, 176, was the case of a dwelling-house and grocery belonging to one man, although standing on the land of another; and in *Russell v. Richards*, 1 *Fairf.* 431, the owner of land on which another man had erected a saw-mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, build-

ings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone, and loam might also be converted into personal property by such a sale, and carried off the land, without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one-half of the farm, the half would not have been part of the thing granted because it would not have been passed by the deed. But the fence was *within the description* of the thing granted as clearly as the land itself; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was within the description of what the grantor professed to convey, that doubt can be solved in a moment, by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it; although it could not have so passed if it had not been within the description.

It all comes to this: The grantor undertook to convey it as part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by the deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the Supreme Court must therefore be
AFFIRMED.

HUNT v. BAY STATE IRON COMPANY.

97 Mass. 279. 1867.

FOSTER, J. There can be no doubt that the rails when laid upon the road-bed and fastened there so that engines and cars

could pass over them would have become annexed to the realty, and ceased to be personal property, in the absence of any agreement changing the ordinary rule of law.

It was held in *Pierce v. Emery*, 32 N. H. 484, and *Haven v. Emery*, 33 N. H. 66, that rails delivered under an agreement that they should be laid down on a specific part of the railroad and continue the property of the vendors until a specified price was paid for them, remained the personal property of the vendors until payment, and were not, when laid so inseparably annexed to and incorporated with the realty that they could not be removed for non-payment of the price. The agreement of the parties was held to supersede the general rule of law, and to be binding likewise upon subsequent mortgagees with notice. Notice to the trustees was held to be notice to the bondholders under such a mortgage. But without notice it was considered that the mortgagees would not be affected by a private agreement changing the natural and legal character of the property from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances which by the general rules of law would result from such a purchase. We are satisfied with the principles and follow the authority of these cases: *Strickland v. Parker*, 54 Me. 263.

Our own adjudged cases fully support the position that the rails when laid became a part of the realty in the absence of any agreement to the contrary: *Pierce v. Goddard*, 22 Pick. 559; *Winslow v. Merchants' Insurance Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Richardson v. Copeland*, 6 Gray, 536. They likewise recognize the doctrine that buildings and other erections or fixtures so attached to the realty as to become ordinarily a part thereof may, by agreement between the parties, remain personal property: *Curtis v. Riddle*, 7 Allen, 185. Both of these propositions seem to be everywhere accepted as sound law.

Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be and by its ordinary nature is a part

of the realty: *Elwes v. Mawe*, 3 East, 38; 2 Smith Lead. Cas. 99, and notes. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.

Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver. Land-owners having a lien upon the location for their damages and a right to take possession for default of payment, stand in the same position so long as their right remains to enforce payment by entering on the land.

Whether the mortgage of the railroad, executed before these rails were laid, but then invalid, and afterward confirmed by the Legislature, should be treated as a security prior or subsequent to the laying of the rails, will probably not prove a material question in this case. By the agreement of the parties it must be sent to a Master to ascertain all the facts as to notice; upon the coming in of his report we can more conveniently and intelligently determine whether the agreement with Mr. Slater is still capable of being enforced.

It is valid between the parties, Slater and the original corporation, but binding upon prior mortgagees and the land-owners (if they remain entitled to possession as security for their damages), so far only as they have consented that the rails shall remain personalty. It is binding upon such subsequent incumbrancers and grantees as had notice of it when they acquired title, but upon no others.

PIERCE v. GODDARD.

22 Pick. 539. 1839.

WILDE, J., drew up the opinion of the Court. This action is submitted on an agreed statement of facts, by which it appears that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterward he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed he, for a valuable consideration, sold the last mentioned lot and house to the defendant.

There are two counts in the declaration, one for the conversion of the newly erected house, and the other for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house cannot admit of a doubt; but it does not follow that the property in the new house vested in the plaintiff.

The rules of law by which the right of property may be acquired by accession or adjunction were principally derived from the civil law, but have been long sanctioned by the Courts of England and of this country as established principles of law.

The general rule is that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England, as well as by the civil law, a trespasser who willfully takes the property of another can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed

into a different species, and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another: 2 Kent's Comm. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law that if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, may, though some of them are for shipping, and builds a ship, the property follows not the owners but the builders: *Mol. de Jure Mar.*, lib. 2, c. 1, § 7.

Another similar exception is laid down by Chancellor Kent in his *Commentaries*, which is directly in point in the present case. If, he says, A builds a house on his own land with the materials of another the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them: 2 Kent's Comm. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said that if timber be taken and made into a house it cannot be reclaimed by the owner; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held that if a man takes trees of another and makes them into boards, still the owner may re-take them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed; and it was held that he had a right so to do. But it was also held that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the Year Books, 5 Hen. 7, 16; and I am not aware of any modern decision or

authority in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 *Fairfield*, 429, cited by the plaintiff's counsel, was decided on the ground that the building in controversy was personal property, and had never become a part of the freehold. In the present case it cannot be questioned that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport for the conversion of the new house. And it is equally clear that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building was the tortious act of Davenport, for which he alone is responsible.

PLAINTIFF NON-SUIT.

*Standing Forest Trees are a Part of the Realty, Etc.**

COCKRILL v. DOWNEY.

4 *Kan.* 427. 1868.

BAILEY, J. This was an action for trespass, commenced before Alonzo Cottrell, J. P., by plaintiff in error, against defendant in error, to recover the value of three loads of wood, hauled from the land of the plaintiff in error, by the defendant in error, claiming triple damages under the provisions of ch. 208 of the Comp. L. The action was commenced on the 28th day of December, 1866, and, after several continuances, was tried by a jury, who found a verdict for the plaintiff. The defendant appealed, and the cause was again tried at the April term of the District Court of Marshall County, 1867, and judgment rendered for the defendant.

The plaintiff in error, who was also the plaintiff below, now

*See Sec. 1510 et seq., Vol. 10, *Cyclopedia of Law*.

brings the case to this Court to procure a reversal of the last-mentioned judgment.

It appears from the bill of exceptions that the defendant, Downey, and one Abraham Gossuck, were the former owners of the land on which the alleged trespass was committed, and that Gossuck and wife conveyed all their interest in the land to Caloni Walworth, by deed dated February 10, 1865, and that subsequently, on the 28th of August, 1865, defendant, Downey, conveyed all his interest in said land to Walworth, without any reservation whatever, and that said Walworth conveyed the land to plaintiff by deed of warranty, without reservation.

On the trial, the defendant filed no answer to plaintiff's petition on appeal, but offered himself as a witness to prove, with others, that there was a parol reservation of the dead and down timber in the deed from Downey to Walworth, and also in the deed from Walworth to plaintiff, Cockrill. Objection was made to this evidence, but the objection was overruled by the Court, and the evidence admitted. We think the Court erred in admitting the evidence. The policy of our laws, as evinced by the whole tenor of legislation as to registration of deeds and the like, is to make titles to real estate depend upon the written deeds of the parties, leaving the smallest possible margin for parol contracts, understandings, and reservations.

A deed of land must be, we think, deemed to involve all timber standing or growing on it, unless specially excepted. As to trees standing and growing in the soil, we apprehend that no question would be made; but a tree may be standing and not growing, or growing in a horizontal position, not standing.

Must the law apply a different rule in each case? Suppose the case of trees prostrated by a tornado, but with roots still adhering to the soil; shall they pass by the deed, or be reserved by parol? Obviously, such trees must be considered as part of the realty, and we think that there can be no safer general rule than that founded on the old maxim, "*Cujus est solum ejus est usque ad caelum*," which may, perhaps, be liberally translated: The owner of the soil owns from the centre of the earth up to the sky." Various qualifications and limitations have been established as to fixtures, emblements, and the like;

but we find no judicial warrant or authority for the claims of the defendant in this case.

The judgment must be reversed, and the case remanded for a new trial.

BRACKETT v. GODDARD.

54 Me. 309. 1866.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property, and may be seized and sold on execution: Staples v. Emery, 7 Greenl. 301. So, wheat or corn growing is a chattel, and may be sold on execution: Whipple v. Tool, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed: 2 Kent, 346, or by statute, as in this State, by R. S., c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser: Goodrich v. Jones, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard, with the intention

of being replaced in the season of hop raising, are part of the real estate: *Bishop v. Bishop*, 1 *Kehan*, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks *Richardson, C. J.*, in *Kittridge v. Wood*, 3 *N. H.* 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It would have been otherwise had they been cut into logs or hewed into timber: *Cook v. Whitney*, 16 *Illinois*, 481.

The defendant, at the plaintiff's request, traveled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Off-set allowed.—Defendant **DEFAULTED**, to be heard in damages.

*Rule When Tree Extends Over Property Line.**

GRIFFIN v. BIXBY.

13 *N. H.* 454. 1841.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended

*See Sec. 1512, Vol. 10, *Cyclopedia of Law*.

to adopt that line: *Allen v. Kingsbury*, 16 Pick. R. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return: *Brown v. Gay*, 3 Greenl. R. 126; *Ripley v. Berry*, 5 Greenl. 24; *Esmond v. Tarbox*, 7 Greenl. R. 61; *Thomas v. Patten*, 13 Maine R. 329; *Prescott v. Hawkins*, *ante*, 20, 26; and see 1 U. S. Dig. 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact, which strengthens the case, and shows the propriety of the rule: *Jackson v. Ogden*, 7 Johns. R. 241; *Clark v. Munyan*, 22 Pick. R. 410.

As to the second question, in *Waterman v. Soper*, 1 Ld. Raym. 737, cited for the defendants, Holt, C. J., ruled that if A plants a tree on the extreme limits of his land, and the tree growing extend its roots into the land of B, next adjoining, A and B are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in Co. Litt. 200, b., it is said, "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt v. Porter*, 8 B. & C. 257, it was held that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two ten-

ants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted that for an entire destruction of the wall by one trespass might have been sustained.

Without going to the extent of the ruling in *Lord Raymond*, we are of opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. See cases cited in *Odiorne v. Lyford*, 9 N. H. Rep. 511.

LYMAN v. HALE.

11 Conn. 177. 1836.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed is whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted, that a part of the branches overhang, and that a portion of the roots extend into the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on in the argument that the mere fact that some of the branches overhang the defendant's land creates such a joint ownership. Indeed, such a claim could not have been made with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus" (it is said) "if a house overhang the land of a man, he may enter and throw down the part hanging

over, but no more; for he can abate only that part which constitutes the nuisance: 2 Roll. 144, l. 30; *Rex. v. Pappineau*, 2 Stra. 688; *Cooper v. Marshall*, 1 Burr. 267; *Welsh v. Nash*, 8 East. 394; *Dyson v. Collick*, 5 Barn & Ald. 600; 7 Serg. & Lowd. 205; Com. Dig. tit., action on the case for a nuisance: D. 4. And in *Waterman v. Soper*, 1 Ld. Raym. 737, the case principally relied on by the defendant's counsel, it is laid down: "That if A plants a tree upon the extremest limits of his land, and the tree, growing, extend its root into the land of B, next adjoining, A and B are tenants in common of the tree. But, if all the roots grow in the land of A, though the boughs overshadow the land of B, yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground the charge proceeded in the Court below; and on this the case has been argued in this Court. We are to inquire, then, whether this ground be tenable. The only cases relied upon in support of the principle are the case already cited from Ld. Raymond, and an anonymous case from Rolle's Reports, 2 Roll. 255. The principle is, indeed, laid down in several of our elementary treatises: 1 Sw. Dig. 104; 3 Stark. Ev. 1457, n. Bul. N. P. 84. But the only authority cited is the case from Ld. Raymond. And it may well deserve consideration, whether that case is strictly applicable to the case at bar; and whether it carries the principle so far as is necessary to sustain the present defense. That case supposes the tree to be *planted* on the "extremest limit"—that is, on the *utmost point or verge* of A's land. Is it not, then, fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line? And in the case cited from Rolle, the tree stood *in the hedge* dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree? We think not; and, if it were, we cannot assent to it; because, in the first place, there would be insurmountable difficulties in

reducing the principles to practice; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to practice? And here it should be remembered that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained?

Again: if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportions do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties?

Again: suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action?

And again: on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. Rep. 141, it was adjudged that, where a tree grows in A's close, though the roots

grow in B's, yet, the body of the tree being in A's soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J., in the case of *Holder v. Coates*, 1 Moo. & Malk. 112; 22 Serg. & Lowb. 264. He says: "I remember when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Pop. Rep. 161, 163; *Norris v. Baker*, 3 Bulstr. 178. See, also, 20 Vin. Abr. 417; 1 Chitt. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury in the Court below was on this point erroneous.

It is, however, contended that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged that land comprehends everything in a direct line above it; and, therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And, in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use: *Beardslee v. French*, 7 Conn. Rep. 125; *Welsh v. Nash*, 8 East. 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 7 Serg. & Lowb. 205; 2 Phill. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the Court below, and that it be reversed.

The other Judges ultimately concurred in this opinion; Williams, C. J., having at first dissented, on the ground of a de-

eision of the Superior Court in Hartford County (Fortune v. Newson), and the general understanding, and practice in Connecticut among adjoining proprietors.

JUDGMENT REVERSED.

*Manure is Held to be Real Property at Common Law.**

DANIELS v. POND.

21 Pick. 367. 1838.

SHAW, C. J., drew up the opinion of the Court. Two questions arise in the present case, the first, as to the form, the second, as to the plaintiff's right of action.

1. The tenant in this case was tenant at will; and it seems a well-settled rule that if a tenant at will commits waste it is a determination of the will and an act of trespass, and that *quare clausum fregit* will lie by the reversioner: Phillips v. Covert, 7 Johns. R. 1; Suffern v. Townsend, 9 Johns. R. 35.

It was further contended that the plaintiff had not such a possession of the manure as would enable him to maintain trespass *de bonis asportatis*.

The plaintiff, by the purchase, had become owner of the farm with all its incidents, subject only to the tenancy at will of Nason. If the manure became the plaintiff's at all it was as part of and incident to the realty. Nason had a qualified possession of it for a special purpose only, that is, to be used upon the farm. The moment he sold it the act was an abandonment of that special purpose, he parted with his only right to the possession or custody of it, it vested in the plaintiff as owner of the freehold, and the right of possession followed the right of property: Farrant v. Thompson, 5 Barn. & Ald. 826; Wolcott v. Pomeroy, 2 Pick. 121; Ayer v. Bartlett, 9 Pick. 156. As the tenant's sale conveyed no title to the defendant, the action of trespass well lies against him if the property was the plaintiff's.

2. The Court are of opinion that manure made on a farm

*See Sec. 1513, Vol. 10, Cyclopaedia of Law.

occupied by a tenant at will or for years in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with soil or other substances, is by usage, practice, and the general understanding so attached to and connected with the realty that, in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee: *Lassel v. Reed*, 6 Greenl. 222; *Kittridge v. Woods*, 3 N. H. 503. The authority of the first of these cases is supposed to be impaired by a subsequent one decided by the same Court: *Staples v. Emery*, 7 Greenl. 201. But the Court do not profess to call in question the correctness of their former decision, but, on the contrary, affirm it and distinguish the latter case from it.

The rule here adopted will not be considered as applying to manure made in a livery stable, or in any manner not connected with agriculture or in a course of husbandry.

In the present case the defendant had notice, both from Blake and from the plaintiff, of the claim and title of the plaintiff to the manure before the sale; he therefore stands in the same situation with Nason, neither better nor worse.

JUDGMENT FOR THE PLAINTIFF.

*Alluvion Deposits Belong to the Owner of the Land Adjoining.**

INGRAHAM v. WILKINSON.

4 Pick. 268. 1826.

PARKER, C. J. The material facts upon which we are to decide this case are that the island in dispute between the parties is situated in Pawtucket River, where it is not navigable for ships or boats, and where the tide does not ebb and flow; that the plaintiffs are owners of a tract of land on the east side of the river, extending up and down the river beyond the

*See Sec. 1514, Vol. 10, Cyclopaedia of Law.

island, and that the defendants are owners of a similar tract on the west side of the river; that the island is not held by any separate grant by either, nor does any other person claim it by virtue of any grant or by possession; and that both the plaintiffs and the defendants, and those under whom they severally claim and hold their farms on the main land, have occasionally cut trees on the island, but that no agricultural improvement has been made thereon. In a partition of the estate among the heirs of Ebenezer Bucklin, father of the grantor of the plaintiffs, this island was set off to those heirs in 1766, but it does not appear that any possession was taken or holden under the partition, except the occasional cutting of wood for forty or fifty years past. It appeared, also, that the defendants, or those under whom they claimed, had cut wood on the island for thirty years past at pleasure, without any objection having been made by those who held under Bucklin.

It is obvious from this statement that neither the plaintiffs nor the defendants had obtained such exclusive possession of the island, or any part of it as would enable either to maintain trespass against the other, without referring their possession to some title; and it is equally obvious that no title appears in either, except what may be derived from their property in the land on either side of the stream or river opposite to the island. And thus we are obliged to consider the rights of those who own the land on the banks of streams or rivers not navigable. And this depends altogether, we think, upon the principles of the common law, there being no statute of this Commonwealth, or of the province, nor ordinance of the colony, which alters the common law in this respect, except in relation to the fisheries, which having from the beginning been made the subjects of legislative care, must be governed by such rules and regulations as the several Legislatures have established.

The common law recognizes an important distinction, as to the use of waters and the property of the soil, between rivers or waters navigable and those which are not navigable. The former invariably and exclusively belong to the public, unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in

front of their own land, and have a property in the bed or soil of the river under the water, subject, however, to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience, or pleasure. This is called, in the civil law, a servitude, which is quite consistent with the right of property. The text-book from which this common-law principle is most generally deduced is Sir Matthew Hale's celebrated treatise, *De Jure Maris*, published in Hargrave's Law Tracts, p. 37, on recurrence to which it will appear that Hale referred to the ancient British writer, Bracton, for the foundation of his doctrine, and that he also relied upon the Roman civil law, as compiled in the Digest in the reign of Justinian. See Dig. lib. 41, tit. 1, *De acquirendo Rerum Domino*, leg. 7, 12, 29, 30, 38, 56, 65, and perhaps many others.

This public right in navigable waters and the soil or flats under them is changed by the colonial ordinance of 1641, which gives to the proprietors of upland bordering on such places the property of the soil down to the channel, unless it exceed the distance of one hundred rods, reserving still, however, to the public the right of passage over the water. But, according to judicial constructions of this ordinance, these flats may be occupied by wharves or other erections, provided the passage to lands above is not thereby too much straitened or obstructed: *Anc. Charters*, etc., 148.

There appears, however, to be an important difference between the common and the civil law, in regard to the rights of the public and individuals, on this subject. By the former it would seem that the right of the king or the public is limited to those places, whether bays, coves, inlets, arms of the sea, or rivers, in which the tide ebbs and flows, this being the definition of navigable waters; whereas by the civil law all rivers properly so called, even above tide-waters, provided they are navigable by ships or boats, or perhaps any other floating vehicle, are considered as public property; and so is the French law, as will appear by the Code Napoleon, liv. 2, tit. 1, c. 3, art. 538, in which are enumerated, among other subjects of public domain, *les fleuves et rivières navigables ou flottables*; which last word seems to have been coined to comprehend all streams on which boats, rafts, lumber, or any other species of property may

be transported. It is probable that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, of the latter being of consequence for passage or transportation above the tide.

The common-law right of public property, restricted as it seems to be, except for easement or right of way, may be found very inconvenient in its application to many of the magnificent fresh-water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use. And on this account it has been decided by the Supreme Court of Pennsylvania that the public right to the bed of the river Susquehanna is the same as it is to the ports, harbors, etc., upon the sea; so that the proprietor of the banks could not extend his claim of property *usque ad filum medium aquæ*, as by the common law he would have the right: *Carson v. Blazer*, 2 Binn. 475. But the Supreme Court of New York felt themselves bound by the common law, and adjudicated accordingly in the cases reported in 17 Johns. Rep. 211, and 20 Johns. Rep. 90. And in a question relating to the fishery in the river Connecticut, one of the largest in the eastern part of the United States, the Supreme Court of Connecticut adopted the principles of the common law in regard to the extent of the property of borderers upon the river down to the *filum aquæ* or middle of the river: *Adams v. Pease*, 2 Conn. Rep. 481. In this Commonwealth the question has not directly arisen, except in regard to the fisheries, which are held to be the exclusive right of the owners of the banks of rivers, unless otherwise appropriated by acts of the Legislature, this right being, according to our common law, held subject to the control of the Legislature, unless by particular grant or prescription it has been held free of that control.

With respect to the river now in question, however, and the part of it where the island in controversy is found, which is above tide-waters, and which we have a right to presume is not navigable even for boats, we think it clear that the common-law doctrine applies, giving to the proprietors of the banks the property of the bed of the river *usque ad filum medium aquæ*.

The question then arises, to whom belongs an island formed by a division of the waters of a river, where but for the island the borderers on the river would meet each other in the middle of the river? And this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have nevertheless been adopted by the common law as fairly coming within its general principles.

The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *flum aquæ*, belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line, the *flum aquæ* as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. "If the *flum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle both *fila*, the one half will belong to the one lord, and the other to the other:" Hargr. Law Tr. 3—. So by the civil law: Dig. lib. 41, tit. 1, § 29. "*Inter eos qui secundum unam ripam prædia habent, insula in flumine nata, non pro indiviso communis fit, sed regionibus quoque divisis; quantum enim ante cujusque eorum ripam est [tantum], veluti linea in directum per insulam transducta, quisque eorum in eo habebit certis regionibus.*" Although this seems applicable to several owners on the same side of the river, yet the principle must be the same when applied to the owners of the opposite sides, for it treats the river, as to the question of property in its bed, in the same manner as if no island was there. And so the compilers of the Napoleon Code consider it, who, without doubt, in most of that code, had reference to the civil law. The 561st article of the Code Napoleon, tit. 2, c. 2, is in these words: "*Les îles et attérissements qui se forment dans les rivières non navigables et non flottables, appartiennent aux propriétaires riverains du côté où l'île s'est*

formée; si l'île n'est pas formée d'un seul côté, elle appartient aux propriétaires riverains des deux côtés, à partir de la ligne qu'on suppose tracée au milieu de la rivière." Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands the origin of which cannot be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land.

According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are co-extensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines. And this settles the present case in favor of the plaintiffs, for it appears that the bridge removed extended from their land to the island; the removal of it was therefore a trespass. But in regard to the trees cut down, it is not shown on which part of the island they stood; so that whether they belonged to the plaintiffs or to the defendants does not appear.

The verdict, being for the defendants, must be SET ASIDE, and a NEW TRIAL GRANTED.

*Aerolites Belong to the Owner of the Land.**

GOODARD v. WINCHELL.

52 N. W. R. 1124. 1892.

GRANGER, J. The District Court found the following facts, with some others not important on this trial: "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 98, range No. 25, in Winnebago County, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to.

*See Sec. 1515, Vol. 10, Cyclopedia of Law.

(2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the 2d day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for \$105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. . . . (10) I find the value of said aerolite to be one hundred and one dollars (\$101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; and that a member of Hoagland's family saw the aerolite fall, and directed him to it." *As conclusions of law, the District Court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful.* It is insisted by appellant that the conclusions of law are erroneous; that the enlightened demands of the times in which we live call for, if not a modification, a liberal construction, of the ancient rule "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy;" and we are cited to the language of Black-

stone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, and supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules; and note, if at all, wherein the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title—that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by "movables," within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about sixty-six pounds weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the

soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable—that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these ex-

changes have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of special value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as appellant is pleased to dominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of \$101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said

by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encyclopedia of Law (vol. 15, p. 388) is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Soc.*, 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an areolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meagre to indicate the trend of legal thought. Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the District Court is **AFFIRMED**.

CHAPTER XL

OF THE ANNUAL PRODUCTS OF THE LAND.*

See *Brackett v. Goddard*, 54 Me. 309, 1866, given in previous chapter.

*See Secs. 1516-1518, Vol. 10, *Cyclopedia of Law*, and cases there cited.

CHAPTER XII.
OF RIGHTS AND INTERESTS APPURTENANT TO LAND.*

*See Secs. 1519-1521, Vol. 10, *Cyclopedia of Law*, and cases there cited.

CHAPTER XIII.

SOURCES OF TITLE IN THE UNITED STATES.*

*See Secs. 1522-1532, Vol. 10, Cyclopedia of Law, and cases therein cited.

CHAPTER XIV.

COVENANTS OF TITLE.*

*See Secs. 1533-1545, Vol 10, *Cyclopedia of Law*, and cases there cited.

CHAPTER XV.
RECORDING OF DEEDS AND MORTGAGES.*

*See Secs. 1546-1551, Vol. 10, Cyclopaedia of Law, and cases therein cited.

CHAPTER XVI.

OF ABSTRACTS OF TITLE.*

*See Secs. 1552-1555, Vol. 10, Cyclopaedia of Law, and cases therein cited.

PART II.

LEADING CASES ON PLEADING IN CIVIL ACTIONS AT COMMON LAW.

CHAPTER I.

THE SUBJECT INTRODUCED.*

*Importance of the Study of the Early English Common Law
Pleading.***

McFAUL v. RAMSEY.

20 How. 523. 1857.

This case was brought up, by writ of error, from the District Court of the United States for the district of Iowa.

The case is stated in the opinion of the court.

Mr. Justice GRIER delivered the opinion of the court.

Ramsey, the plaintiff below, instituted this suit in the district court of the United States for the district of Iowa. The parties of that court have been permitted to frame their pleadings, not according to the simple and established forms of action in courts of common law, but according to a system of pleadings and practice enacted by the state to regulate proceedings in its own courts. The code commences by abolishing "all technical forms of actions," prescribing the following court rules for cases, whether of law or equity:

"Any pleading which possesses the following requisites shall be deemed sufficient:

"1st. When to the common understanding it conveys a reasonable certainty of meaning.

*See Secs. 1556-1572, Vol. 10, Cyclopaedia of Law.

**See Sec. 1556, Vol. 10, Cyclopaedia of Law.

"2d. When, by a fair and natural construction it shows a substantial cause of action or defence.

"If defective in the first of the above particulars, the court, on motion, will direct a more specific statement; if in the latter, it is ground of demurrer."

If the right of deciding absolutely and finally all matters in controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought, from the allegations of the party *ore tenus*, or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned in the law, and the decision of the facts to a jury, necessarily requires that the controversy, before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defence into certain writings called pleadings. These should clearly, distinctly, and succinctly state the nature of the wrong complained of, the remedy sought and the defence set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous. At one time, the excessive accuracy required, the subtlety of distinctions introduced by astute logicians, the introduction of cumbrous forms, fictions, and contrivances, which seemed only to perplex the investigation of the truth, had brought the system of special pleading into deserved disrepute, notwithstanding the assertion of Sir William Jones, that *"it was the best logic in the world, except mathematics."* This system is said to have come to its perfection in the reign of Edward III. But in more modern times it has been so modified by the courts, and trimmed of its excrescences, the pleadings in every form of common-law action have been so completely reduced to simple, clear, and unambiguous forms, that the merits of a cause are now never submerged under folios of special demurrers, alleging errors in pleading, which, when discovered, are immediately permitted to be amended. This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions

of sciolists, who invent new codes and systems of pleading to order. *But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of action for different wrongs requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.*

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice. In the case of *Randon v. Toby* (11 Howard, 517), we had occasion to notice the operation of a code similar to that of Iowa. In a simple action on a promissory note, the pleadings of which, according to common-law forms, would not have occupied a page, they were extended to over twenty pages, requiring two years of wrangle, with exceptions and special demurrers, before an issue could be found between the parties. In order to arrive at the justice of the case, this court was compelled to disregard the chaos of pleadings, and eliminate the merits of the case from a confused mass of *fifty* special demurrers or exceptions, and decided the cause without regard to these contrivances to delay and impede a decision of the real controversy between the parties. In the case of *Bennet v. Butterworth* (11 Howard, 667), originating under the same code, the court was unable to discover from the pleading the nature of action or remedy sought. It might, with equal probability, be called an action of debt, or detinue, or replevin, or trover, or trespass, or a bill in chancery. The jury and the court below seem to have labored under the same perplexity, as the verdict was for \$1,200, and the judgment for four negroes. In both these cases this court have endeavored to impress the minds of the judges of the district and circuit courts of the United States with the impropriety of permitting these experimental codes of pleading and practice to be inflicted upon them. In the last mentioned case, the chief justice, in delivering the opinion of the court, says: "The constitution of the United States has recognized the distinction between law and equity, and it *must* be

observed in the federal courts." In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. *But in those states where the courts of the United States administer the common law, they cannot adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either.*

We have made these few introductory remarks before proceeding to notice the merits of the controversy, as developed by the record, in order that the bar and courts of the United States may make their records to conform to these views, and not call upon us to construe new codes and hear special demurrers or pleadings which are not required to conform to any system founded on reason and experience. To test such pleadings by the logical reasoning of common law, after requiring the party to disregard all forms of action known to the law under which he seeks a remedy, would be unreasonable and unjust.

The plaintiff's petition sets forth his grievance in plain, intelligible form, if not with technical brevity and simplicity.

1st. He alleges a contract with defendant to deliver to him eight hundred hogs, on or before a certain day; in consideration whereof the defendant agrees to pay plaintiff \$5.50 per hundred pounds net. He avers that he did deliver according to contract, at the time and place, the number of eight hundred hogs; that defendant refused to receive over five hundred and fifty of them, or pay for the remainder.

2d. He complains that defendant refused to butcher the hogs in accordance with the agreement, and thus caused by his delay, then the plaintiff was put to expense in feeding the hogs, and exposed to a great loss in the *net weight*.

3d. That the defendant did not make a true return of the net weight, but defrauded plaintiff on that behalf.

4th. That he slaughtered twenty-four more hogs than he accounted for, and improperly cut off parts of others to reduce their weight.

5th. The plaintiff alleges, in what might be called a second count, another contract to deliver fourteen hundred hogs to defendant, at \$6.50 per hundred net.

He avers delivery according to contract, and charges defend-

ant with delay in slaughtering them; causing great loss in the weight, and expense to plaintiff in feeding them in the meanwhile.

6th. He charges defendant with taking one hundred other hogs of plaintiff, for which he refused to account.

7th. That in consequence of delay in receiving, many of the hogs died, to the great loss of plaintiff.

8th. That defendant returned false weights of these fourteen hundred and cut off parts before weighing.

9th. The plaintiff also sets up a third contract for five hundred hogs, which were delivered, and avers the same delay and consequent injury to plaintiff; and the same frauds in weighing, etc.

To this catalogue of grievances the defendant, in his answer pleads thirty-three distinct denials of the averments in the petition. A jury was called to try these thirty-three issues and found a verdict for plaintiff and assessed his damages.

No exception was taken on the trial to the admission or rejection of evidence; no error is alleged in the charge of the court; and a regular judgment was entered on the verdict.

The only bills of exception were to the refusal of the court to grant a continuance and change the venue; both of which were matters of discretion of the court below, and not the subject of review here.

The cavils to the sufficiency of the plaintiff's statement, under the name of a special demurrer, were overruled by the court below, and justly, because the code permits a demurrer only when the petition, "by a fair and natural construction does not show a substantial cause of action." As we have already shown, it contains a dozen.

The judgment of the court below is **AFFIRMED**, with costs.

CHAPTER II

OF FORMS OF ACTION AT COMMON LAW.*

*Kinds of Personal Actions—Debt.***

UNITED STATES v. COLT.

Peters, C. C. (Circuit Court for Pennsylvania)

145-154. 1815.

This was an action of debt brought upon an embargo bond in the district court, in June, 1811, and the declaration demanded \$20,000, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach by the defendant, "whereby the United States are entitled to demand a sum not exceeding \$20,000 and not less than \$1,000, viz., \$20,000," which it averred to be due to the plaintiffs and detained from them by the defendant. Upon *nil debet* pleaded, the jury found a verdict for \$4,000. The defendant took out a writ of error, returnable at April sessions, 1812, of the circuit court; and the case now came on for decision.

WASHINGTON, J. The question in this case is whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain, is that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said that the very sum demanded must be proved, and on a demand for thirty pounds you can no more recover twenty pounds than you can a horse on a demand for a cow. *Blackstone says (3 Blackstone, Com., 154) that debt, in its legal acceptation, is a sum of money due by certain and express agreement, where the quantity is fixed and does not depend on any*

*See Sec. 1573, Vol. 10, *Cyclopedia of Law*.

**See Sec. 1577 et seq., Vol. 10, *Cyclopedia of Law*.

subsequent valuation to settle it; and, for non-payment, the proper remedy is the action of debt to recover the specific sum due. So, if I verbally agree to pay a certain price for certain goods and fail in the performance, this action lies, for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims or recover nothing at all. For the debt is one single cause of action, fixed and determined, and which, if the proof varies from the claim, cannot be looked upon as the same contract of which performance is demanded. If I sue for thirty pounds I am not at liberty to prove a debt of twenty pounds and recover a verdict thereon, for I fail in the proof of that contract which my action has alleged to be specific and determinate. But indebitatus assumpsit is not brought to compel a specific performance of the contract, but is to recover damages for its non-performance, and, the damages being indeterminate, will adapt themselves to the truth of the case as it may be proved, for if any debt be proved it is sufficient.

The doctrine laid down by this writer appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated; to recover back money which a bailiff has paid more than he had received, and in a variety of other cases where the law, by implication, raises a contract to pay. 3 Com. Dig. 365. The sum may not be fixed by the contract, but may depend upon something extrinsic which may be averred; as, a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action, the plaintiff averring that he did expend a certain sum. 2 Bac. 20. So, on promise by defendant to pay his proportion of the expenses of defending a suit in which defendant was interested, with an

averment that plaintiff had expended so much, and that defendant's proportion amounted to so much. 3 Levy, 429. So an action of debt may be brought for goods sold to defendant for so much as they were worth. 2 Com. Dig. 365. So debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 T. Rep. 63.

Wooddeson (3d vol. 95) states that debt will lie for an indeterminate demand which may be readily reduced to a certainty. In *Emery v. Fell*, 2 Term R. 28, in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labor, money laid out and expended, and money had and received, the court on a special demurrer sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. But the court took no notice of the first objection, and avoided the second by implying a contract of sale from the words which stated a sale. These cases prove that debt may be maintained upon an implied as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield in the case of *Walker v. Witter*, Doug. 6, is conclusive upon this point. He lays it down that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say that whenever *indebitatus assumpsit* is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of *nil debet* the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and, secondly, that on the plea of *nul tiel record* judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favor of the defendant on the second point and against him in the first, by deciding that debt could be maintained on a foreign judgment, because *indebitatus assumpsit* might; and that the uncertainty of the debt demanded in the declaration was no objection to the bringing of an action of debt. The decision, therefore, given upon that point was upon the very point on which the cause turned. But, independent of the opinion given in this case, is it not true, to use

the words of Buller, "that all the old cases show that whenever *indebitatus assumpsit* is maintained debt also lies."

The subject is very satisfactorily explained by Lord Loughborough, in the case of *Rudder v. Price*, 1 H. Black. 550, which was an action of debt, brought on a promissory note payable by instalments, before the last day of payment was past, in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided that the action could not be supported, because the contract, being entire, would admit of but one action, which could not be brought until the last payment became due, although *indebitatus assumpsit* might have been brought. But his lordship was led to inquire into the ancient forms of action on contracts; and he states that in ancient times debt was the common action for goods sold and for work and labor done. Where *assumpsit* was brought it was not a general *indebitatus assumpsit*, for it was not brought merely on a promise, but a special damage for a non-feasance, by which a special action arose to the plaintiff. The action of *assumpsit* to recover general damages for the non-performance of a contract was first introduced by *Slade's Case*, which course was afterwards followed. In the case of *Walker v. Witter*, Buller also stated that till *Slade's case* (T. 44 Eliz. 4 Co. 92 b), a notion prevailed that on a simple contract for a certain sum the action must be debt; but it was held in that case that the plaintiff might bring *assumpsit* or debt, at his election.

Thus, it appears that in all cases of contract, unless a special damage was stated, the primitive action was debt, and that the action of *indebitatus assumpsit* succeeded principally, I presume, to avoid the wager of law, which, in *Slade's case*, was one of the main arguments urged by the defendant's counsel against allowing the introduction of the action of *assumpsit*, as it thereby deprived the defendant of his privilege of wagering his law. Buller seems, therefore, to have been well warranted, in the case of *Walker v. Witter*, in saying that all the old cases show that where *indebitatus assumpsit* will lie debt will lie. The same doctrine is supported by the case of *Emery v. Fell*, 2 Term R. 30, which was an action of debt in which all the counts of *indebitatus assumpsit* are stated, where the objection to the doctrine was made and overruled. So, in the case of *Harris v. Jameson*,

5 Term B. 557, Ashurst refers with approbation to the opinion delivered in the case of Walker v. Witter. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of Walker v. Witter, as appears by the case of Rands v. Peck, Cro. Jac. 618; and in Draper v. Rastal the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyns, in his Digest, title "Debt," page 366, where he enumerates the cases in which debt will not lie, states no exception to the rule that where *indebitatus assumpsit* will lie debt will lie, but one for the interest of money due upon a loan. But the reason of that is explained by Lord Loughborough in the case of Rudder v. Price, who states that until the case of Cook v. Whorwood, upon a covenant to pay a stipulated sum by instalments, if the plaintiff brought *assumpsit*, after the first failure, he was entitled to recover the whole sum in damages; because he could not in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision the only difference between debt and *assumpsit*, in such a case, was that the former could not be brought until after the last instalment was due; and in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone before stated. After stating what constitutes debt, he observes "that the remedy is an action of debt to recover the special sum *due*." It is observable that he does not say that the plaintiff is to recover the sum *demanded* by his declaration, and no person will deny but that he is to recover the special sum due.

After stating what constitutes a debt and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds, "the action of *assumpsit* is most commonly brought, because in that it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum so proved in damages." If this writer merely means to say that, where a special contract is laid in the declaration, it must be proved as laid, the doctrine will not be contro-

verted. If debt be brought on a written agreement the contract produced in evidence must correspond, in all respects, with that stated in the declaration, and any variance will be fatal to the plaintiff's recovery. Such too is the law in all special actions in the case; but if Judge Blackstone meant to say that, in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. The old cases before mentioned, in which debt was brought and sustained, are all cases where it is impossible to suppose that the sum stated in the declaration was or could in every instance be proved, any more than it is or can be proved in actions of *indebitatus assumpsit*. They are in fact, actions substantially like to actions of *indebitatus assumpsit* in the form of action for debt. The action of debt for foreign money is and can be for no determinate sum, because the value must be found by the jury, either upon the trial of the issue or upon a writ of inquiry where there is judgment by default. Randall's Peake.

The case of *Sanders v. Mark* is debt for an uncertain sum, in which the debt claimed was for fifteen pounds, eighteen shillings and six pence, and the defendant's proportion of the whole sum was averred to be fifteen pounds, eighteen shillings and eight pence; yet the action was supported. This is plainly a case where the sum due could not be certainly averred, because the yearly value of the defendant's property might not be known to the plaintiff and could only be ascertained with certainty by the jury. In the case of *Walker v. Witter*, Lord Mansfield is express upon this point. He says that debt may be brought for a sum capable of being ascertained though not ascertained at the time of bringing the action; and he adds that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of *Rudder v. Price*, Lord Loughborough, who has shed more light upon this subject than any other judge, says that long before *Slade's case* the demand in an action of debt must have been for a thing certain in its nature; yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered.

In short, if, before *Slade's case*, debt was the common action

for goods sold and work done, it is more obvious that it was not thought necessary to state the amount due with such precision as that less could not be recovered; for in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained though not ascertained, or perhaps capable of being so when the action was brought. Whence the opinion arose that, in an action of debt on a *simple contract*, the whole sum must be proved, I cannot ascertain. It certainly was not and could not be the doctrine prior to Slade's case; and it is clear that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough in the above case denominates it an erroneous opinion, and says that it has been some time since corrected.

In the case of *M'Quillen v. Coxe*, the sum demanded was five thousand pounds, which was fifty more than appeared to be due by the different sums. The objection was made on a special demurrer that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration or the misrecital of the writ, but overruled the demurrer because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

From this last expression it might be supposed that the court meant to distinguish between the sum demanded by the writ and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ and that demanded by the declaration was the same, viz., five thousand pounds. There was in fact no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ, and the objection stated in the special demurrer was made to the variance between the sum demanded by the declaration and the sum alleged to be due.

The distinction taken in the case of *Ingledon v. Cripps*, 2 Lord Ray. 815; Salk. 659, runs through all the above cases, and appears to be perfectly rational, viz., that where debt is brought

on a *covenant* to pay a certain sum, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a *remitter* for the balance. This shows that debt may be brought for more than is due, and that the jury may give less; or, if they give more than is due, the error may be corrected by a *remitter*.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract where the sum demanded is uncertain, it would seem to follow that it would lie for a penalty given by the statute which is uncertain, and dependent upon the amount to be assessed by a jury. For, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This, however, stands upon stronger ground than mere analogy. The point is expressly decided in the case of *Pember-ton v. Shelton*, Croke James, 498. That was an action of debt brought upon the first section of the statute (2 Ed. 6, ch. 13), which gives the treble value of the tithes due for not setting them out. The declaration claimed thirty-three pounds as the treble value; and in setting forth the value of the tithes, the whole amount appeared to be more than one-third of the sum demanded, so that the plaintiff claimed less than the penalty given by the statute. Upon *nul debet* pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion upon the ground afterwards laid down in the case of *Ingledon v. Cripps*. They held that there was a difference when the action of debt is grounded on a specialty or contract, which is a sum uncertain, or upon a statute which gives a certain sum for the penalty, and where it is grounded on a demand when the sum is uncertain, being such as shall be given by the jury. In the former it was agreed that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute; but in the latter it is said that if the declaration varies from the real sum it is not material, for he shall not recover according to his *demand in the declaration*, but according to the verdict and judgment which may be given for the plaintiff. It cannot be said that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was

necessary to accommodate the recovery by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty, and that debt was brought upon the common-law principle that, where a statute gives a penalty, debt may be brought to recover it. In this case the statute gives the action of debt, and I cannot perceive in what other form than this one which has been adopted the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying that the demand of one sum does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.

RULE DISCHARGED.

*Same Subject—Replevin.**

WILLIAMSON v. RINGGOLD.

4 Cranch C. C. (*Circuit Court for the District of Columbia*)
39. 1830.

CRANCH, C. J. This is a replevin for the plaintiff's goods, taken on a *fiery facias*, against John Wells, Jr., at the suit of Thomas Carberry, issued out of this court. Mr. Morfit, for the defendant, has moved the court for a return of the goods under the act of assembly of Maryland, 1785, ch. 80, § 14 (and also for a *venditioni exponas*), because the goods were, as it is said, in the custody of the law, and therefore could not lawfully be replevied, whether the plaintiff in replevin was, or was not, the owner of the goods at the time of the taking, and whether they were taken by the marshal out of the actual possession of the plaintiff in replevin, or out of the actual possession of Wells, the

*See Sec. 1584, Vol. 10, *Cyclopedia of Law*.

debtor in the execution. It is understood to be admitted in argument, that the goods were the property of the plaintiff in replevin, at the time of the taking by the defendant, and that the defendant took them to satisfy the execution against Wells. It is not stated whether they ever had been in the possession of the plaintiff, nor whether they were taken from the actual possession of Wells, or from the actual or constructive possession of the plaintiff.

If the goods never had been in the possession of the plaintiff, they must be returned to the defendant under the act of assembly, 1785, ch. 80, § 14, upon a *retorno habendo* bond being given by the defendant; for that act strongly implies that the return to the defendant is to be ordered of course; unless the defendant obtained the possession "forcibly or fraudulently;" or that the possession having been first in the plaintiff, "was got or retained by the defendant, without proper authority or right derived from the plaintiff;" in which case the court is authorized "to refuse to order a return to the defendant, until a judgment is given in the action." But, upon such return, when ordered, the defendant must give bond and security to restore the goods to the plaintiff, if such should be the judgment of the court. If, therefore, the plaintiff cannot show that the defendant took the goods out of his actual or constructive possession, the return must be ordered, of course, to the defendant. *Cullum v. Bevans*, 6 Har. & Johns. 471.

The motion for a return, upon the ground that goods in the custody of the law are not to be replevied, is, in effect, a motion to quash the replevin; for if the return should be ordered, it must be without bond; and such an order would be of course, if the plaintiff in replevin were the debtor in the writ of *fiery facias*; for the law, in that respect, is well settled in this country as well as in England. But it is not well settled, either there or here, that a man cannot maintain replevin for his goods taken out of his actual or constructive possession by an officer, to satisfy an execution against a third person. In some of the states it is well settled that he can. But in Maryland, the court of appeals has lately delivered a solemn opinion that he cannot, in the case of *Cromwell v. Owens*, 7 Har. & Johns. 60, 61.

In England, it will be found that every case adduced in sup-

port of the rule, that replevin will not lie for goods in custody of the law, are cases where the plaintiff in replevin was the debtor himself. It is said to be a rule founded upon the policy of the law; and the reason given by Gilbert on Replevin, 161, in the very passage relied upon in support of the rule, is, that "it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by a replevin; and, therefore, they construe such endeavors to be a contempt of their jurisdiction; and upon that account commit the offender." Goods seized and held by a trespasser cannot, surely, be said to be in custody of the law, except as against the trespasser himself, when they are seized in execution. The policy of the law refuses him the right to question the validity of the judgment, or to deny his interest in the property, by any means that would defeat or delay the execution; but it does not refuse a third person the means of protecting his rights from illegal violation.

The general rule is that replevin will lie wherever trespass will lie for taking the plaintiff's goods. There is, however, this difference between trespass and replevin, that trespass will lie upon possession alone; but replevin requires property in the plaintiff. All that is necessary to support the action is property in the plaintiff, either general or special, and a wrongful taking from the plaintiff's possession, either actual or constructive. The idea suggested by Blackstone, and repeated by several other elementary writers, that replevin will only lie for goods taken by distress, has no foundation. I have not found it supported by a single adjudged case. On the contrary, the cases are abundant, from the time of the year books to the present moment, in which replevin has been supported for goods not taken by distress. Blackstone (3 Com. 145, b.) says: "The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves, so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin." "This obtains only in one instance of an unlawful taking, that of a wrongful distress." For this assertion he cites no authority whatever; and it is believed none can be found.

Baron Gilbert, whose treatise upon the law of replevins was published some years before Blackstone's Commentaries, defines the writ of replevin thus: "*A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels.*" Gilbert on Replevins, 58. Sellon, vol. 2, p. 153, following Blackstone, says: "Replevin is a remedy grounded upon a distress; for goods are only replevisable when they have been taken by way of distress." But he cites no authority except Co. Lit. 145, which gives no countenance to such a doctrine. It only shows that replevin is the proper remedy in cases of distress for rent; but not that replevin will not lie for goods not distrained. On the contrary, Lord Coke says, that when the defendant claims property, although upon the plaint the sheriff cannot try the question, "yet the plaintiff may have a writ *de proprietate probanda*, directed to the sheriff, to try the property; and if, thereupon, it be found for the plaintiff, then the sheriff to make deliverance (for so be the words of the writ); and if for the defendant, he can no further proceed. But that is but an inquest of office; and, therefore, if thereby it can be found against the plaintiff, yet he may have a writ of replevy to the sheriff; and if he return the claim of property, etc., yet it shall proceed in the court of common pleas, where the property shall be put in issue and finally tried." This passage shows that replevin will lie to try the title to goods which have been wrongfully taken from the possession of the plaintiff. In the action of replevin, neither the writ nor the declaration says anything of the goods being taken as a distress. The injury complained of is that the defendant took and unjustly detains the plaintiff's goods, not that he took them for any particular purpose.

In the case of *Shannon v. Shannon*, 1 Sch. & Lef. 327, Lord Redesdale says, "Mr. Justice Blackstone's definition of the action of replevin is certainly too narrow. Many old authorities will be found (in the books) of replevin being brought where there was no distress." "It is an action founded on a taking, and the right which the party from whom the goods were taken

has to have them restored to him, until the question of title to the goods is determined."

In the case of *Meany v. Head*, 1 Mason, 322, Mr. Justice Story said: "At common law a writ of replevin never lies, unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*." In *Ilseley v. Stubbs*, 5 Mass. 283, Mr. C. J. Parsons said: "The defendant, to support his plea, has argued that replevin at common law does not lie, unless where goods are taken by distress as a pledge. It is true that anciently replevin was generally sued out to replevy cattle taken by distress as a pledge; but, in fact, replevin lies for him who has the general or special property in chattels, against him who has wrongfully taken them." So, in *Shearick v. Huber*, 6 Bin. 2, which was replevin against the purchaser of the plaintiff's goods, at the sheriff's sale, under a *fiery facias* against a stranger, Mr. C. J. Tilghman said: "No doubt but replevin is the proper form of action; for although, in England, this form of action has been generally confined to cases of goods distrained for rent, yet, with us it has been used in all cases where chattels, in the possession of one person, have been claimed by another." So, in *Woods v. Nixon*, Addison, 134, the president of the court of common pleas said: "The practice in Pennsylvania has been to issue replevin in all cases where a man claims property detained from him." So, in 2 Wheat. Selwyn N. P. 896, Selwyn says, "that Blackstone's definition is too narrow;" and Mr. Wheaton, in his note, says "that replevin lies for any tortious taking of goods from the possession of the plaintiff, and not in case of a distress only, is well settled in England, and has been recognized and adopted as sound doctrine, by the supreme court of New York."

Dane, in his Abridgment, vol. 5, p. 515, speaking of Blackstone's definition, says, "it has been truly observed that this definition is too narrow." "The writ is founded on a taking and the plaintiff's right to have the goods restored to him until the question of title to them is determined." And Daniel Dulany, in his opinion given in the year 1771, in the case of *Coursey v. Wright*, 1 Har. & McH. 396, says: "The case supposed would exemplify the very definition of replevin; 'a remedy, provided by the law, for the specific recovery of personal property unjustly taken and

detained;' though Blackstone says, very erroneously, that replevin is only in one instance of unlawful taking, that of a wrongful distress." In the case of *Hopkins v. Hopkins*, 10 Johns. 373, Mr. C. J. Kent said: "The action of replevin is grounded on a tortious taking, and it sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return (of the goods) and the plaintiff goes only for damages for the caption."

Comyns (Dig. Replevin, A.) says: "Replevin lies of all goods unlawfully taken." So, in the case of *Pagnburn v. Patridge*, 7 Johns. 143, Mr. Justice Van Ness, in delivering the opinion of the supreme court of New York, said: "The opinion I expressed, on the trial of this cause, that replevin lies only in the case of an unlawful distress, was a mistaken one. The passage to that effect in Blackstone's Commentaries is not warranted by the books. This action is usually brought to try the legality of a distress; but it will lie for any unlawful taking of a chattel. Possession by the plaintiff, and an actual, wrongful taking by the defendant, are the only points requisite to support the action; and none of the cases defining the nature of the action confine it specially to the case of a chattel taken under pretense of a distress. The old authorities are, that replevin lies for goods taken tortiously, or by a trespasser, and the party injured may have replevin or trespass at his election. This is so laid down by Gascoigne, J., 7 H. 4, 28, b; and by Danby, J., 2 E. 4, 16; and by Brian, J., 6 H. 7, g; and these *dicta* are cited as good in law in Bro. Ab., tot. Replevin, pl. 36, 39, and in Rol. Ab., tit. Replevin, B. The same rule was admitted by the judges in *Mason v. Dixon*, 1 Jones, 173, and in *Bishop v. Montague*, Cro. Eliz. 824. Similar language is held in many of the modern authorities, and particularly by Baron Gilbert, Baron Comyns, and Lord Redesdale. The opinion of the latter is reported by Schoales and Lefroy, in which he lays down the law with peculiar accuracy and precision." The case from 6 H. 7, 9, is thus stated by Brooke, Replevin, pl. 36: "A man takes my goods as a trespasser. I may have replevin, although the trespasser has property by the *tort*, for this is of the property which I had at the time of the caption; but I cannot have *detinue*, for that is of the property which is in me at the time of the action brought. (Per

Brian) : "The case from the Year Book, 7 H. 4, 28, b, is abridged by Brooke, tit. Replevin, pl. 15, where he says : "By some replevin will not lie for beasts taken *contra pacem*; but, per Gascoigne, he may have replevin or trespass." The case from 2 E. 4, 16, is thus abridged by Brooke, tit. Replevin, pl. 39 (per Danby) : "when a trespasser takes my goods, I may have replevin, for I may affirm the property in me, or I may have trespass, and disaffirm the property. Note.—That by him, where a man delivers his goods to W. N., and a stranger takes them, yet the bailor may give them to another and the gift is good. Littleton, *contra*, for the property is in the stranger; and he said well, as it seems; and yet that replevin lies, is good law, for this is of the property that was in him at the time of the caption; but in the other case, the property was not in him at the time of the gift." These cases are also cited by Rolle, in his Abridgment, tit. Replevin, B. 2, as good law. He also says (tit. Replevin, c. 1) : "If the cattle of a man are manuring and agisting my land, *levant et couchant*, and are taken by strangers, I may have replevin. 42 E. 3, 18; 21 H. 8, 14, b; 11 H. 4, 17, and 2 E. 3, 44." The case of Leonard v. Stacy, 6 Mod. 68, was replevin for goods of which the plaintiff had been cheated.

It is admitted on all hands that "property in the defendant," or even "in a stranger," is a good plea. It follows, therefore, that when the property is taken by the defendant, from the possession of the plaintiff, under the claim of title, replevin is the proper action to try that title. But the plaintiff in replevin cannot be supposed to know, beforehand, what pretense the defendant may set up as an excuse for the taking; and whether that excuse be true or not cannot be known until the trial, so that it cannot be said, in any case where the taking of the plaintiff's goods has been from the possession of the plaintiff himself, that replevin will not lie. It is true, that in many such cases of taking, replevin cannot be maintained, because upon the trial, it may turn out that the taking was lawful; but still, in those cases, replevin is the proper action to try the lawfulness of the taking, and the court will not quash the writ before that question is decided, unless the writ shall have been issued under such circumstances as to be a contempt of the court. Gilbert on Replevin, 161. This happens when the improper interference of

one of the parties in the cause obstructs the execution of the judgment of the court. In such a case it is considered as a constructive contempt. *The general rule, then, is clearly established, that replevin will lie for every wrongful taking of the plaintiff's goods out of his possession.*

But there is said to be an exception to this general rule, and that is, where the goods are in the custody of the law. It may be well here to inquire, in what cases goods are said to be "in the custody of the law:" 1. *When cattle are justly seized for rent arrear, or for damage feasant, and impounded, but not before they are impounded.* Thus, Gilbert on Replevin, pp. 61, 62 (ed. 1757), says: "'Tis to be observed that there are two things complained of in this writ, viz., the taking and detention of the pledges, as the words of the writ express it, *quæ cepit et injuste detinet*; but what is principally contraverted in replevin is, whether the taking be just or not. For there are but two cases wherein a distress, justly taken, whether for rent or *damage feasant*, can be unlawfully detained. The first is, where the arrears of rent, or amends for the damage, are tendered to the party distraining; and this tender must be made before the beasts are impounded; for when the beasts are in the custody of the law, the person distraining cannot be said unlawfully to detain what is in the custody of the law." 2. *When goods are distrained for fines or taxes, or by way of execution upon convictions before inferior tribunals, they are in the custody of the law; as in The King v. The Town Clerk of Guilford, 8 Mod. 208; Marriot v. Shaw, Comyns' Rep. 274, and Rex v. Monkhouse, 2 Str. 1184, which were convictions under the game laws. Winnard v. Foster, 2 Lutw. 1191, where goods were taken by attachment, to enforce payment of the judgment of an inferior court. Aylesbury v. Harney, 3 Lev. 204, where a silver cup was seized, upon a condemnation by justices of the peace, under the excise acts, for the non-entry of strong waters. Gins v. Dams, 2 Lutw. 1179, where cattle were taken by a warrant of two justices, for a poor rate; Clift's Entries, 636, for a militia fine; Levinz's Entries, 152, on a conviction of fraud upon the excise; Lukin v. Eve, Moore, 89, for amercement in a court leet; Co. Ent. 570, b, 572, a, 573, a; Fletcher v. Ingram, 5 Mod. 124; Stephens v. Houghton, 2 Str. 847; Tott v. Ingram, 1 Brownlow, 185, 189.*

So, for breach of a by-law, *Winch. Ent.* 90; 3 *Wils.* 155. So, for a poor-rate, *Milward v. Coffin*, 2 *W. Bl.* 1330. So, for a judgment of commissioners of sewers, *Pritchard v. Stephens*, 6 *T. R.* 522. These were all cases where the goods were clearly in the custody of the law, and yet there was no question that replevin would lie. In many of them the plaintiff recovered, and in all of them the causes appear to have been tried upon their merits, except the case of *Rex v. Monkhouse*, 2 *Str.* 1184, where the court granted an attachment against the under-sheriff for granting a replevin for goods seized under a conviction, by an inferior tribunal for deer stealing. It is a very short note of a case, and it does not appear whether the replevin was quashed, nor whether the officer was punished for the contempt. But in a preceding case, *Rex v. Burchett*, 1 *Str.* 567, which was replevin for goods taken upon a distress, under the game laws, the court discharged the rule to show cause why an attachment should not issue against the officer who issued the replevin, and refused to set aside or quash the replevin. *S. C.* in 8 *Mod.* 208. The reason given for discharging the rule was, "that it was only a contempt to the inferior jurisdiction of the justices, and, in that case, the *B. R.* never interposes."

A third case, where goods are said to be in the custody of the law, is, where they have been seized in execution, upon a writ of fieri facias, or attachment issuing from a superior court.

In this case, it is admitted on all hands that the debtor himself will not be permitted to replevy them out of the hands of the officer; but this cannot be on the ground that the goods are in the custody of the law, for they are equally in the custody of the law when distrained and impounded for rent arrear, or for *damage feasant*, or for taxes, or for fines, or by way of execution of the judgments of inferior tribunals; and yet the books are full of cases of replevin for goods thus seized, and in custody of the law. It is only upon the ground of constructive contempts of court, out of court, that the superior tribunals in England have restrained the issuing of a replevin, where the debtor, or any party to a suit in those tribunals, has attempted to obstruct the execution of their judgments. Thus *Gilbert (on Replevin, 161)* says, "If a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of

the execution, and if any person should pretend to take out a replevin and execute it, the court of justice would commit them for a contempt of their jurisdiction, because, by every execution the goods are in the custody of the law, and the law ought to guard them; and it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by a replevin; and therefore they construe such endeavors to be a contempt to their jurisdiction, and upon that account, commit the offender. But if any inferior jurisdiction issues an execution, a replevin will lie for the goods taken by that execution; because the inferior jurisdiction, being restrained within particular limits, the officer who took the goods is obliged to show that he took the goods within those limits; and that the inferior court which issued the execution did not exceed their authority in issuing it. Besides, an inferior court cannot commit for contempt out of the court; and hence it is that the officer of an inferior court is to show by what authority he took the goods. Thus, in a replevin the defendant was put to justify by a condemnation before a justice of peace for not entering of strong waters; and a warrant, on that, for levying 20 s. fine on the plaintiff." *Aylesbury v. Harvey*, 3 Levinz, 204.

The distinction here taken between the proceedings of courts of superior and inferior jurisdiction is very just, because everything is presumed to be within the cognizance of a court of superior jurisdiction which is not clearly shown to be out of it; and nothing is presumed to be within the cognizance of the inferior tribunal unless clearly shown to be within it. Hence, *prima facie*, the proceedings of a court of general jurisdiction are right; but those of a court of limited jurisdiction are wrong unless everything appears upon the face of the proceedings which is necessary to give jurisdiction to the tribunal. Therefore, as the debtor is not bound to admit more than appears on the face of an execution issuing from a court of limited jurisdiction, and as such executions do not, on their face, show all that is necessary to support the jurisdiction, he is permitted to put the officer or the creditor upon the proof of that jurisdiction; and the means afforded him is a writ of replevin, to try the lawfulness of the distress, or of the caption of the goods. It is true that the judgment and the execution of an inferior or limited tribunal are as

valid, in all matters within its jurisdiction, as those of a court of general jurisdiction; but the question of jurisdiction of an inferior tribunal is always open; and he cannot be "construed" to be guilty of a contempt, who only takes the usual legal means of trying the lawfulness of that seizure of his goods which has been made under the process of a court of doubtful jurisdiction. It is only where the issuing or the service of the writ of replevin can be punished as a contempt of the court from which the execution issued, that the books show that replevin will not lie for goods taken in execution. The books, however, are incorrect in saying that in such cases replevin will not lie. They only mean to say that the party serving the writ will be liable to attachment for his contempt in obstructing the execution of the judgment of the court, and that the court will perhaps quash the writ which is the means of that obstruction. The additional reason, therefore, given by Gilbert is a sound one, why the rule is only applicable to goods taken by execution from the superior courts; to wit, that they only can punish for constructive contempts out of court. The ideas of Gilbert upon this point are strongly supported by Chief Baron Eyre, in giving his opinion in the case of *Cawthorne v. Campbell*, cited in *Anstruther's Reports*, pp. 206, 212. The question was upon the authority of the court of exchequer to remove into that court, from another court, an action of trespass brought against the commissioners of excise. The Chief Baron placed the authority to remove the cause upon the ground of the action being a contempt of the prerogative of the king in relation to his revenue; and, in p. 212, speaking of a case decided in the time of Henry VII, he says, "In this, they evidently proceeded upon a general analogy to the proceedings in other courts; for there is no court that suffers its process, either to be insulted or to be materially interrupted; and whenever this is attempted, it is a contempt upon which the court proceed to grant attachments in the first instance." "But that this jurisdiction is not a very novel thing, nor this a single instance, we may collect from other cases that are very clearly established; namely, that if a man, at this day, there being a seizure in order to condemnation, was to presume to replevy the goods, it would be a contempt of the court for which an attachment would be granted instantly." "So if a distress is taken for a fee-farm

rent, or other duty to the crown, it is considered a contempt to replevy; and an attachment will issue upon it, as appears by the case of *The King v. Oliver*, in *Bunbury*, 14." "Originally, therefore, it seems to me, that to call into question, or in any manner to interrupt the course of the prerogative jurisdiction, was treated as a contempt of the process of the court, and proceeded against immediately as such."

The only cases cited in support of the rule that goods taken in execution cannot be replevied are cases of contempt; unless the loose dictum of Bacon in his *Abridgment*, tit. *Replevin*, C., respecting *Bradshaw's Case*, and the dictum of Mr. Justice Powell, there referred to, can be called cases, where none of the facts of the case are stated, nor any book referred to in which they can be found. Bacon says, upon his own authority, that "it was ruled, in the case of one *Bradshaw* (T. 12 W. 3, in C. B.), that when an act of parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie; but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him. And Powell, Justice, said he remembered a case in the exchequer, where a distress was taken for a fee-farm rent due to the king, yet, upon debate in the court, no attachment was granted, though it was the king's case." In these cases there was neither an actual nor a constructive contempt of the authority of any court; for the first case supposes a distress and sale under an act of parliament; and the other was a distress for rent; when, therefore, it is said, that in such cases replevin will not lie, I understand the expression to mean no more than that replevin cannot be maintained. Thus, it is said generally that replevin lies only for a wrongful taking; meaning that it can be maintained in such case only; not that it will not lie to try the question whether wrongful or not.

In the note in the new edition of Bacon's *Abridgment* (Phila. 1811, vol. 6, p. 56), it is said: "A replevin does not lie for goods seized by warrant of a justice of the peace upon a conviction for destruction of the game, etc. *Semb.*, 2 Mod. Cas. 208, 209." This reference is, no doubt, to the case of *The King v. The Town Clerk of Guilford*, reported in 1 Mod. Cas. (8 Mod.) 208, 209, B. R., 10 Geo. 1724, which was this: "One *Burchett* was con-

victed by a justice of peace for keeping dogs, nets, and ferrets to catch conies, not being qualified, etc. And by a warrant from the said justice, his goods were distrained for the forfeiture; and whilst they were in possession of the constable, and before they were sold, the town clerk granted a replevin to take them from the constable. And now it was moved to set the replevin aside, because goods, thus taken by distress on such convictions, are irrepleviable; and for an attachment against the town clerk. "The court would not set aside the replevin; but made a rule to show cause why an attachment should not go." This case appears again in *Strange*, 567, under the name of *Dominus Rex v. Burchett*, thus: "The court ordered an attachment *nisi* against the town clerk of Guilford, and a defendant convicted on the game act, for granting and issuing out a replevin for goods distrained for the penalty; but on showing cause at the next term when Eyre, Justice, only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case, B. R. never interposes." This case, then, is a direct authority against the principle which it is cited to establish; for the court both refused to quash the replevin and to issue an attachment of contempt for issuing it. There is also in the same edition of Bacon's Abridgment, vol. 6, p. 56, this other note a. to the case of *Bradshaw*, there cited: "But now, in such cases, it is considered as a contempt for a party to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14." I have not seen *Bunbury's* report of that case; but it is a case of a fee-farm rent due to the king, cited by Chief Baron Eyre, in the case in *Anstruther*, before mentioned. It was a prerogative case in the exchequer, and therefore gives no support to the rule respecting goods taken in execution from an inferior court; except, that it shows contempt, and not mere custody of the law, is the ground of the rule. The note goes on further to say, that "replevin does not lie for goods distrained on a conviction for deer-stealing; and if a sheriff grants it, an attachment shall go against him. *Rex v. Monkhouse*, 2 Str. 1184." The whole case in *Strange* is in these words: "The court granted an attachment against the under-sheriff of Cumberland for granting a replevin of goods distrained on a conviction for deer-stealing." This is the whole case; and yet it

seems to be the principal authority upon which all the books rely to support the principle that goods taken under an execution from an inferior court cannot be replevied; although in many preceding cases of that kind, as we have before seen, replevin was maintained.

Mr. Durnford, in his note to the case of *Pearson v. Roberts* in Willes' Rep. 672, in controverting the position of Chief Baron Gilbert that replevin will lie for goods taken by an execution issued by an inferior jurisdiction, says that "the two reasons given by Gilbert by no means warrant it." "His first reason," says Mr. Durnford, "fails, if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution; in short, if it be a legal execution regularly executed." Surely Mr. Durnford could not mean to say that this is a reason why replevin should not lie to try the question whether the goods were taken within the limited jurisdiction, and whether the court did not exceed its jurisdiction in issuing the execution. If he did, it is a *petitio principii*. As well might he say that for goods lawfully taken as a distress for rent, replevin will not lie, in order to try the question, whether lawfully taken or not.

The question which Gilbert was discussing was not whether replevin could be maintained for goods lawfully taken in execution, but whether it will lie for goods taken in execution, whether lawfully or unlawfully; that is, whether the plaintiff will be permitted to commence that sort of action to try the lawfulness of the taking, and to get back his goods while that question shall be pending. Mr. Durnford's argument only goes to show that the plaintiff would not be entitled to recover upon the trial, not that he might not commence the suit. "And with regard to the second reason," Mr. Durnford says, "it does not follow, because an inferior court cannot commit for a contempt out of court, that therefore a replevin will lie; the want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing does not prove that the thing itself may be legally done." Here is the begging of another principle, to wit, that the rule is not grounded, as Gilbert supposed, upon the doctrine of constructive contempts. If the rule be grounded entirely

upon that doctrine, then the rule does not apply to those tribunals towards which there can be no constructive contempt.

Mr. Durnford observes, "The only authority cited by Gilbert in support of this opinion is the case of *Aylesbury v. Harvey*, 3 Lev. 204, of which," he says, "it is sufficient to observe, 1st, that this question was neither agitated at the bar nor decided by the bench; and 2d, that the judgment of the court was against the plaintiff in replevin." Now, it was because the question was not agitated nor decided by the bench, that Gilbert cited it as authority that whenever the defendant in replevin justifies under the authority of a tribunal of limited jurisdiction, he must show that he took the goods within the limits, and that the inferior court did not exceed its jurisdiction; and that replevin will lie for goods taken under the authority of such a limited jurisdiction. For it will be seen by the pleadings in that case, which are given at full length in Levinz's Entries, 152, that the defendants had able counsel, and that their plea sets forth every particular necessary to give jurisdiction to the court, and to justify the caption of the goods; which particularity would have been unnecessary if it were sufficient merely to show that the goods were taken under an execution issued by such a court. That such a point should not have been suggested, either by the bar or the bench, is strong evidence that such was not then the law. Mr. Durnford proceeds: "But in opposition to this opinion" (of Gilbert) "may be placed *Bradshaw's Case*, 6 Bac. Ab. 55; *Rex v. The Sheriff of Leicestershire*, 1 Barnard, B. R., 110; *Rex v. Monkhouse*, 2 Str. 1184; and *Rex v. Burchett*, id., note 1." The case of *Bradshaw* has been mentioned before as being very loosely reported. It merely states "that a distress and sale, under an act of parliament, is in the nature of an execution, and replevin does not lie; yet the issuing of it is no contempt." The particular circumstances of the case and the grounds of the decision are not stated, nor what effect the decision had upon the cause; whether to quash the writ, or to guide the jury in their verdict, or to arrest the judgment. So loose a case cannot be considered as entitled to any authority.

The next case arrayed against the Chief Baron is *Rex v. The Sheriff of Leicestershire*, reported, as it is said, in 1 Barnardiston's Reports of Cases in B. R. 110. This case I have never seen.

Mr. Durnford has not given us the substance of it; but it is sufficient to say, with Lord Kenyon (1 East, 642), "that Barnardiston was a bad reporter;" and with Lord Mansfield (2 Burr., 1142), that "it was marvelous to those who knew the sergeant and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout."

The next case which is to put down the authority of Gilbert is *Rex v. Monkhouse*, before mentioned, and reported in two lines and a half. These, and the case of *Burchett*, said to be in a note to the case of *Rex v. Monkhouse*, in Str. 1184, but which is not in my edition, and which, no doubt, is the case which I have already cited from 8 Mod. 208, 209, and Strange, 567, constitute the whole array, in opposition to the deliberate opinion of Gilbert, in a well considered treatise upon the subject, supported by the large number of cases already cited, and many more, which I have omitted to notice, in which replevin has been maintained for goods taken by way of execution of the judgments of inferior tribunals. Mr. Durnford, indeed, cites two cases which are against him, and endeavors to avoid their force. The first is *Milward v. Coffin*, 2 W. Bl. 1330, which was replevin for goods taken under a warrant of distress by two justices of the peace for poor-rates. The defendant justified under the statutes of 43 Eliz. and 17 Geo. 2, as overseers of the poor; and judgment was rendered for the plaintiff. Mr. Durnford supposes he evades the force of this case by saying that the justices exceeded their authority; and that "the goods were not, in contemplation of law, taken under an execution." But that could not be ascertained until the trial; and it was to try that very question that the writ was issued and held to lie. If the justices had jurisdiction, the goods were taken under an execution; if they had not jurisdiction, they were not. This was the very point tried in the cause, and to try which the writ was issued; so that replevin will lie, whether the justices have jurisdiction or not, because it must lie before that question can be decided. The other case cited by Mr. Durnford is *Pritchard v. Stephens*, 6 T. R. 532, which was a rule to show cause why a replevin for goods taken under a warrant of distress, granted by commissioners of sewers, should not be quashed. The counsel in support of the

rule contended that the goods in question could not be replevied at all, and cited the following passage from Callis, 200 (a book which I have never seen): "If, upon a judgment given in the king's court, or upon a decree made in this court of sewers, a writ or warrant of *distringas ad reparationem*, or of that nature, be awarded, and the party's goods be thereby taken, these goods ought not to be delivered by replevin, to be taken either out of this court or out of any other court of the king; because it is an execution out of a judgment." And the counsel stated that Callis, in page 197, makes a distinction between those goods that remain in the custody of the officer under the seizure, and those that afterward come into the hands of a purchaser, saying that the former are not replevisable; and that Callis, also, in page 195, in distinguishing inferior from superior courts, says of the former, "a replevin doth not lie, and ought not to be granted from the sheriff or any of his deputies, for that the Sewer is a judicial court of record, and of greater authority than the power of the sheriff, which, in these cases, is but ministerial." The counsel on the other side said, "It is not necessary to controvert the opinions of Callis, which have been relied on by the defendant (though it might be shown, if necessary, that those opinions are not tenable), because no judgment was in fact given by the commissioners of sewers." The court said that, "at all events, this was a reason why they ought not to interfere in this summary way by quashing the proceedings, but should leave it to the defendant to put his objection on record in a formal manner; and in the course of the argument Lord Kenyon, C. J., expressed very strong doubts respecting the opinions cited from Callis." The rule was discharged, and we have heard no more of the cause. These opinions of Callis, respecting which Lord Kenyon expressed such strong doubts, are the very opinions which Mr. Durnford attempts to support in his note to the case of *Pearson v. Roberts*. But it is not true, as Mr. Durnford alleged, that the only authority cited by Gilbert was the case of *Aylesbury v. Harvey*. He cited also the case of *Winnard v. Foster*, Lutwyche, 1191; *Rastell's Entries*, 275 (probably a misprint for 553); *Bro. Abr.*, *Replevin*, pl. 22; 38 *Eliz.* 3, 3; *Lev. Ent.*, 152, all strongly supporting his opinion. The case of *Winnard v. Foster*, *Lutw.* 1191, was replevin for a cow, a stack of hay, and a pike of hay. The

defendant made cognizance, as bailiff of the sheriff, and set forth, in his cognizance, that the cow and hay were in the possession of one Nathaniel Day. That one William Dawson, at a county court of said county, produced a writ of *justicies* to the sheriff, by which he was commanded to justice the said Nathaniel Day that he render to the said William Dawson £14, which he owed him, etc., etc., stating, in a minute manner, all the proceedings in the county court; the levying the plaint; the summons delivered to the bailiff and his return; the failure of Day to appear; the order for attachment by his goods, and the service thereof upon the goods in question as the goods of the said Nathaniel Day. The plaintiff replied that, at the time of the caption, he was in possession of the cow and hay as of his own goods and chattels, and denied that Nathaniel Day was possessed of them as his goods and chattels at the time of caption; upon which traverse the issue was joined; and the jury found the issue for the defendant as to the cow, and for the plaintiff as to the hay; and the plaintiff had judgment for the damages and costs as to the hay, and the defendant had judgment for the return of the cow and for his costs. This case shows that replevin will lie for goods taken by attachment from an inferior court; and that it was supposed, at least by the defendant's counsel, necessary to set out, in the plea, minutely, all the circumstances which gave jurisdiction to the court under whose process the defendant justified the caption.

The ancient forms of entries and pleadings are evidence of the law. Gilbert referred to Rastell's Entries, although the page 275, cited, is evidently a mistake, yet in folio 553, we find the form of an avowry for an amercement or fine in the *lete, hundred, or torn*, in which everything necessary to show the jurisdiction is minutely set forth with all the circumstances of time, place, etc. He also referred to Levinz's Entries, 152, which contains the pleadings at large in the case of *Aylesbury v. Harvey*, cited by him from 3 Levinz, 204. He also referred to Bro. Ab., tit. Replevin, pl. 22, which contains an abridgment of the Year Book, 28 Eliz. 3, 3, in these words (translated): "Replevin: the defendant avowed for this, that he had recovered 38 s. in the court baron, by plaint there, and these beasts were delivered to him in execution of the judgment, and issue taken that they were

not delivered to him in execution." These authorities, cited by Gilbert, are, to my mind, much more satisfactory in favor of his opinion than those cited by Mr. Durnford are against it.

It seems to me very clearly, that the rule contended for (to the extent to which it has been actually carried by adjudged cases) is not founded upon the fact alone that the goods are in the custody of the law; but upon the right and duty of the court to enforce its judgment against the parties to the suit, and upon its power to punish as for a contempt, any endeavor, by a party, to obstruct or defeat the execution. And I find my opinion strongly corroborated by that of the celebrated Maryland lawyer, Daniel Dulany, in the case already alluded to, of *Coursey v. Wright*, in 1 Har. & McH. 394. The question which he was discussing was, whether Thomas Coursey could have brought replevin against T. Wright, while he, T. Wright, had possession of the property under his replevin against John Coursey. Mr. Dulany said, "I have little doubt but he might." The transaction being *inter alios*, as it cannot affect the right, so neither can it affect the remedy, which is inseparable from the right. The cases in 8 Mod., Gilbert and Strange, proceed on a peculiar principle. When goods belonging to a defendant are taken in execution on *feri facias*, or by distress, on conviction, they being in the custody of an officer, acting under the mandate of authority, are in the custody of the law for the very purpose that justice may be done; but if the replevin by the defendant were allowable, the views of justice might be disappointed, and the very object of the judgment destroyed; but if the property of a stranger should be taken, it would be a wrong, and consequently the thing taken would not be in the custody of the law. In the first instance it would be incongruous for the law to allow a process to defeat its ends; but in the second, very agreeable to its principles that a man should not suffer an injury from the act of a stranger. Execution authorizes the officer only to make, or levy the debt or penalty, out of the chattels of the defendant; but in taking, for the purpose, the chattels of another person, he acts without authority. If the sheriff, on a *fi. fa.* against the effects of A., takes and sells the goods of B., the owner may sue him. 1 Burr. 31. In replevin, the plaintiff shows the cattle of a stranger for the cattle of J. D., and the

officer takes them, he is a trespasser. 2 Roll. Ab., tit. Replevin, 431. "In case of distress for rent arrear, the goods, from the first taking, are in the custody of the law, and not merely in the distrainer, 3 Bl. 146; but their being in this custody does not prevent the suit by replevin; on the contrary, the suit is most proper in the very instance. When replevin is brought, the defendant may defend his possession, if he has property, by the writ *de proprietate probanda*. As he has the means to secure his possession, and as if the plaintiff in replevin should fail, the defendant may be entitled to a *retorno habendo*, it might be reasonable (as full justice might be obtained without it) to say that the defendant in replevin should not, during the pendency of the suit, bring replevin on his part, as it would tend to infiniteness. But the case of a stranger is very different. He cannot make himself party to the suit; entitle himself to the writ *de proprietate probanda*, 2 Roll. Ab. 431, or to a return, in any event of the suit. Not being provided for, or having the means of security afforded him on the suit, he consequently has a remedy by action against the possessor; for there cannot be an irremediable right; and it would shock the first principles of justice to allow that what A. B. may do shall deprive C. of his right. The true legal ground of replevin is the unjust taking and detaining of personal property; and of the remedy, that the owner may be specifically restored to it, and compensated for the injury from the unjust detention." "A denial of justice is injustice; suspension is deprivation for the time. Injury is not denominated from its degree." In Maryland, the opinions of Mr. Dulany, when deliberately given, have ranked almost, if not quite as high in the scale of authority, as cases adjudged in the highest tribunals of the state during his time. That which I have cited recommends itself to every reflecting mind by its sound sense combined with its sound law.

In the present case it is not necessary to decide whether replevin will lie for goods taken in execution issued by a court of limited or inferior jurisdiction, because the execution against Wells was from this court, which is a court of general jurisdiction. It became important, however, to investigate that doctrine, with a view to ascertain the ground upon which the rule rests, that goods taken in execution cannot be replevied, and

the extent of that rule. It is with that view only that the note of Mr. Durnford has been so minutely examined.

With regard to the extent of the rule, I have found no adjudged case, except that of *Cromwell v. Owens*, 7 Har. & Johns. Rep. 55, in which the rule has been extended to a third person, whose goods have been taken out of his actual or constructive possession, to satisfy the debt of another person. All the cases of replevin cited in support of the rule are cases in which the debtor himself was plaintiff in replevin. Such was *Pearson v. Roberts*, Willes' Rep. 672; *Milward v. Caffin*, 2 H. Bl. 1330, cited in *Pearson v. Roberts*, and all the cases cited in Mr. Durnford's note to that case, namely, *Aylesbury v. Harvey*, 3 Lev. 204; *Bradshaw's Case*, Bac. Ab., Replevin, c.; *Rex v. Sheriff of Leicestershire*, 1 Barnard, B. R. 110; *Rex v. Monkhouse*, 2 Str. 1184; *Rex v. Burchett*, id. note 1, and *Pritchard v. Stephens*, 66 T. R. 522. So, also, were the other cases of replevin cited by the defendant's counsel in the case of *Cromwell v. Owens*, except the case of *Ladd v. North*, 2 Mass. 514, which was replevin by a third person; but no question was made whether it would lie. The case of *Thompson v. Button*, 14 Johns. 84, is decidedly against the rule in the extent contended for; because the replevin was sustained and judgment rendered for the plaintiff. But there the plaintiff was not the debtor in the execution, and the goods were taken out of the possession of the plaintiff. The case of *Eaton v. Southby*, Willes, 136, was a replevin by the vendee of the sheriff for corn sold under an execution against a former tenant, and distrained by the landlord for arrears of rent due from a subsequent tenant, the corn having been sold before it was reaped, and distrained after it was cut, and before it was fit, in the course of husbandry, to be carried away by the vendee. The question was, whether the corn could be distrained under those circumstances; and the court was of opinion that it could not, even if it had not been taken in execution, because the former tenant, being tenant at will, and his tenancy determined by his death, he had a right to keep the corn on the ground until, in the usual course of husbandry, it was fit to be carried away. The only part of that case applicable to the present is the dictum, "that goods taken in execution, or distrained for *damage feasant*, are in the custody and under the protection of the law, and

therefore cannot be distrained for rent," which dictum, in regard to goods taken in execution, is not supported by the reference to Co. Lit. 47 a.

The case of *Alexander v. Mahon*, 11 Johns. 185, cited in *Cromwell v. Owens*, was an action of trover, and was probably cited for a similar dictum, that goods, seized under execution, are in the custody of the law, and therefore not distrainable; and for the reason assigned. "For it is repugnant, *ex vi termini*, that it should be lawful to take the goods out of the custody of the law." In that case the goods were lawfully taken in execution, and therefore were in the custody of the law; but it would be equally repugnant, *ex vi termini*, to say that goods unlawfully taken and detained were in the custody of the law. The case of *Palgrave v. Windham*, 1 Str. 212, was an action upon the case by a landlord against the officer who took the tenant's goods in execution, and removed them from the premises without paying one year's rent to the landlord; and I do not find in it any point or dictum applicable to the case of *Cromwell v. Owens*, in which it was cited. The case of *Buxton v. Home*, 1 Shower, 174, was debt upon a judgment. The defendant pleaded that he was taken in execution and permitted to escape with the consent of the plaintiff, which plea was adjudged bad on demurrer. There seems to be nothing in that case applicable to the case in which it was cited, or to the present.

The next case cited in *Cromwell v. Owens* is *Farr v. Newman*, 4 T. R. 640, 651. The question in that case was, whether the sheriff, upon a *feri facias* against the executor for his own proper debt, could make the money out of the goods of the testator in the hands of the executor to be administered and so force him to a *devastavit*, after notice by a creditor of the testator that he had judgment against the executor, *de bonis testatoris*, and an execution which he was about to levy on the same goods. It was an action upon the case against the sheriff for a false return of *nulla bona testatoris* upon that execution. The judgment of the court (Buller, J., dissenting) was for the plaintiff. The page 640, referred to in *Cromwell v. Owens*, contains a part of Mr. Justice Buller's argument against the opinion of the court; and probably the following passage was cited: "How is the sheriff to try any one of these questions? It should be enough to him

that the goods are in the possession of the debtor, and used by him as his own. When the plaintiff's execution came to the sheriff's hands they could not take these goods under it. The writ commanded the sheriffs to levy the debt of the goods and chattels of the testator in the hands of Reid and wife to be administered. These goods were not then in their hands, but they were in the hands of the sheriff, and *in custodia legis*; and in Holt, 643, and 1 Shower, 174, it was resolved by Holt, C. J., that goods being once seized and in custody of the law could not be seized again by the same or any other sheriffs." "So the sheriff cannot take goods which have been distrained. *Tulley et al. v. Peachy*, Hill, 23; Geo. 3." But to this Lord Kenyon, C. J., answered, in p. 651, "As to the expression cited from Shower to show that goods once seized cannot be seized again, it must mean, when they are legally seized; for if anything happen to disaffirm the first seizure, and to show that it was not legal, it is considered as no seizure in law; and the word seizure is, in such a case, misapplied."

The case of *Turner v. Fendall*, cited from 1 Cranch, 117, does not seem to have any bearing upon the case. Nor do the other cases of *Ball v. Ryers*, 3 Caines' Rep. 84, and *Sturtevant v. Ballard*, 9 Johns. 337. The case of *Ilsey v. Stubbs*, 5 Mass. 280, was replevin against a defendant who had obtained possession of the goods by replevin against a third person. The defendant pleaded that fact, and that his suit against the stranger was still pending. This plea was adjudged bad on demurrer. If there was anything in that case applicable to the case of *Cromwell v. Owens*, it was against the party who cited it; for the judgment was in favor of the plaintiff in replevin against the defendant, who claimed protection under the rule that the goods were in custody of the law, they having been delivered to him by replevin, and he having given bond to return them in case it should be so adjudged. But it is probable that it was cited for the dictum of C. J. Parsons, that "replevin lies for him who has the general or special property in chattels, against him who has wrongfully taken them; but chattels in the custody of the law cannot, at common law, be replevied, as goods taken by distress upon a conviction before a justice, or goods taken in execution." "But if the goods are wrongfully taken by virtue of legal process, the remedy of the

owner was by action of trespass or trover against the officer. For the common law would not grant process to take from an officer chattels which he had taken by legal process already issued; but the common law has, in this respect, been altered by the statute of 1789, c. 26, § 4. This statute authorizes the suing of a replevin against the officer for chattels which he has attached or seized in execution, provided the plaintiff in replevin be not the debtor. This alteration of the common law has been productive of much practical inconvenience, but it must rest with the wisdom of the legislature to decide whether the common law in this respect should or should not be restored. As a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession."

All this is mere dictum, not at all necessary to the decision of the question before the court. It has already been shown that goods in the custody of the law may be replevied; as in the case of goods distrained and impounded for rent, or *damage feasant*, or for poor-rates, or for fines upon convictions before justices of the peace and other inferior tribunals; and that in every case where it has been adjudged that goods taken in execution could not be replevied, the debtor himself was the plaintiff in replevin. But the chief justice (for whom, while living, I had the highest respect, and whose memory I revere) proceeded to say, "If goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer." No goods can be taken by virtue of process which does not authorize the taking of them; nor can the process authorize a wrongful taking. *Beverly v. Lambert*, 1 Wash. 308, 310, 312. If then the goods were wrongfully taken, they could not be taken by virtue of the process. The execution only authorizes the officer to take the goods of the debtor. If he take the goods of a stranger, he may take them under color of the execution, but not by virtue of the execution. If he took them by virtue of the execution he would be a trespasser, which the chief justice admits he would be.

Again, the chief justice says, "For the common law would not grant process to take from an officer, chattels which he had taken

by legal process already issued." If the word "by" means "by authority of," then the taking by the officer was rightful; and if so, the proposition is correct as a proposition, but not as a reason why the owner of the goods, wrongfully taken by the officer, should be confined to his action of trespass or trover. The chief justice further states that the common law in that respect was altered by the statute of Massachusetts which authorizes the suing of a writ of replevin against the officer for chattels seized by him in execution, provided the plaintiff in replevin be not the debtor. Of the correctness of that proposition I doubt. 1. Because it was never a rule of the common law that goods in the custody of the law could not, for that reason alone, be replevied, as has been already shown. 2. Because no adjudged case has been found in the English books in which it has been decided that a stranger to the execution could not maintain replevin against the sheriff for wrongfully taking his goods for the debt of another. 3. Because, at the time of the passing of the first colonial statute of Massachusetts, in 1641, the law was well settled in England, that in many instances, where goods were in the custody of the law, they might be replevied; as in the case of goods distrained and impounded, either with or without good cause.

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The first case which I find in which the question was started whether replevin would lie in such cases is that of Bradshaw, mentioned in *Bac. Ab., Replevin, C.*, as having been decided *Trin.*, 12 W. 3, in *C. B.*, where "it was ruled that when an act of parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie; but if the sheriff grant one, yet it is not such a contempt as to grant an attachment against him."

But, as before observed, it does not appear whether the court quashed the replevin, or whether judgment was given upon demurrer to the avowry, or whether it was an instruction to the jury upon the trial. At all events it was a rule applicable only to one of the many cases in which goods may be in the custody of the law; and was a case in which the debtor was plaintiff in replevin. This case, however, was ruled in the year 1700. The first statute of Massachusetts on the subject of replevin was passed in 1641; and as the law then was that replevin would lie in cases of dis-

treas by way of execution of the judgments of inferior tribunals, the statute of Massachusetts of 1641 was rather in restraint of the common law than in enlargement of it, when it authorized replevin in all cases of "cattle or goods impounded, distrained, seized, or extended, unless it be upon execution after judgment, or in payment of fines."

The act of 1720, which excepts distress made by a proper officer for any tax, fine or forfeiture, was but an affirmance, in that particular, of the statute of 1641. Whether the statute of 1641 was construed by the court to except the case of goods of a stranger taken in execution does not appear. From the words of the act itself, it would seem to be the most natural construction to confine the exception to goods of the debtor, taken on execution; because it says, "after judgment." Against whom? The most obvious answer is, against the plaintiff in replevin. The 4th section of the act of 1789, c. 26, seems to corroborate this construction, for it takes for granted the right of the third person to replevy his goods wrongfully seized by the officer, and only regulates the manner and process, and designates the tribunal by which it shall be done. It says "that when any goods or chattels shall be taken, distrained or attached, which shall be claimed by a third person, and the person thus claiming the same shall think proper to replevy them," he may sue replevin from the common pleas, in the county where taken, distrained or attached, and in a form prescribed in the act. 5 Dane, Ab. 517, 519. For these reasons, with great deference to the profound learning of the late chief justice of Massachusetts, I must doubt whether the statute of 1789, c. 26, § 4, altered the common law in regard to the goods of a third person wrongfully taken in execution.

It may, perhaps, be said that no such case is to be found in the English books in which replevin has been maintained against the sheriff; and that, if "laid, as per schedule, and replevied," was a good return to a *feri facias*, it would be found in the "Retorna Brevium." One answer, however, will serve for both these objections. In England, under the statute of Marlbridge (53 H. 3, c. 21), the application for a replevin is to be made to the sheriff himself, who has the goods in his possession under the *feri facias*, and who, if a third person claims the property, has the

power of summoning a jury of inquest to inquire to whom the property belongs. Dalton, 146; Gilbert on Execution, 21, cited in *Farr v. Newman*, 4 T. R. 633. If, upon that inquest, it be found for the third person, the sheriff will restore it to him, and be justified in his return of *nulla bona* upon the *feri facias*, so that the whole purpose of replevin is thereby answered. If the jury should find that it is the property of the debtor, he may go on to sell it, and the finding will mitigate damages in an action of trespass, if the goods seized should happen not to be the defendant's. *Farr v. Newman*, 4 T. R. 633. But, in this country, it has not been the practice of the marshal to summon a jury to try the question of property; if he has any doubt, he may require a bond of indemnity from the plaintiff. If the marshal here has no power to summon a jury to inquire of the property, justice seems to require that the owner should have his writ of replevin, if there be no positive rule of law to the contrary.

I have examined the dictum of the chief justice in the case of *Ilsley v. Stubbs* with the more minuteness, because it seems to be relied upon by the court of appeals in Maryland, as the main support of the dictum, in the case of *Cromwell v. Owens*, "that in no case whatever will replevin lie against an officer for goods taken in execution under lawful process." This proposition extends to the case of a stranger's goods wrongfully taken out of the possession of the stranger himself, by an officer, to satisfy the execution against the debtor. The case of *Cromwell v. Owens* was that of a stranger's goods taken out of the possession of the debtor, and that was the only case decided. The general proposition, so broadly laid down by the court, was mere dictum. It is not authority further than it was applicable to the case then before the court. That very respectable tribunal has taken the proposition to be universally true, that goods in the custody of the law cannot be replevied; and that goods wrongfully taken by an officer of the law, under color of lawful process, are in the custody of the law, although the officer in taking them was guilty of a trespass, and although he is liable for damages for every moment that he detains them in that supposed custody of the law. This would, indeed, be an incongruity. There cannot be a wrongful custody of law.

When goods are seized in the possession of the debtor, it may

well be doubted whether replevin can be maintained; yet there does not seem to be any reason why it should not lie (that is, be sued out), to try the question of possession at the time of the caption as well as of title to the property. The possession may be equivocal, as in the case of *Clarke v. Skinner*, 20 Johns. 465, where actual possession was in the debtor, but the right of possession was in the third person, the owner, the plaintiff in replevin. So, in *Thompson v. Button*, 14 Johns. 84, the goods were supposed by the court to have been taken out of the possession of the plaintiff in replevin, and not of the debtor; and the court intimated a strong opinion that if they had been taken out of the possession of the debtor, the replevin could not have been maintained. In the case of *Clarke v. Skinner*, 20 Johns. 465, Mr. Justice Platt, who seems to have considered the case well, and who gave the reasons of his opinion very fully, said: "I am of the opinion that replevin lies in favor of any person whose goods are taken by a trespasser. As to John Clarke (the debtor), the goods were in the custody of the law, and therefore irreplevisable; but, in my judgment, the law does not deny the remedy by replevin to any person whose goods are taken from his actual or constructive possession by a wrong-doer." "The rule, I believe, is without exception, that wherever trespass will lie, the injured party may maintain replevin." "Baron Comyns says, replevin lies of all goods and chattels unlawfully taken (Com. Dig., Replevin, A.); though (Replevin, D.) he says replevin will not lie for goods taken in execution." "This last proposition is certainly not true without important qualifications. It is untrue as to goods 'taken in execution,' when the *fiery facias* is against A., and the goods are taken from the possession of B. By 'goods taken in execution,' I understand goods rightfully taken, in obedience to the writ; but, if through design or mistake, the officer takes goods which are not the property of the defendant in the execution, in the true sense of the rule laid down by Baron Comyns." "By constructive possession, I mean a right to reduce the chattel to immediate possession." And in page 470 he says: "The general rule is that the plaintiff must have a general or special property in him at the time of the unlawful taking of which he complains; that is, he must either have the actual possession, or the right of reducing it to his actual possession, at the

time of the tortious taking. If goods be taken on a *feri facias*, as the property of the defendant named in the execution, and the writ is from a court of competent jurisdiction, and not void from any defect on its face, the officer, as against such defendant, is never a trespasser nor a wrong-doer. As to such defendant, the property is in the custody of the law, and he is precluded by the judgment against him." "But such reasoning has no application to the rights of a stranger whose property has been wrongfully taken on an execution against another person." "In every adjudged case that I have found, where it was held that goods 'taken in execution,' or goods 'in the custody of the law,' could not be replevied, that doctrine has been applied to cases where the defendant in the execution was plaintiff in the replevin." * * *

The general rule, as before observed, is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods. The facts necessary to maintain the suit are, property in the plaintiff, either general or special, and a wrongful taking of the goods out of the plaintiff's possession, either actual or constructive. The possession must be such as would maintain trespass. If the original taking would be lawful, or if the possession never was in the plaintiff, an unjust detention alone will not maintain replevin (*Gardner v. Campbell*, 15 Johns. 401; 2 Wheat. Selwyn, 896), unless attended by some act which would make the defendant a trespasser *ab initio*. *Meany v. Head*, 1 Mason, 322; 5 Bac. Ab., Replevin, F.

I am aware of the cases of *Badger v. Phinney*, 15 Mass. 359, and *Baker v. Fales*, 16 id. 147, but am not satisfied that they can be supported upon principles of common law, however correct they may be under the statutes of Massachusetts." "The whole personal property is liable to execution, except wearing apparel." "But the absolute property of those goods must be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser, for he is obliged at his peril to take notice whose the goods are; and, for that purpose, may impanel a jury to inquire in whom the property of the goods is vested; and this, it is said, shall excuse him in an action of trespass. 2 Bac. Ab., C. 4; *Keilway*, 119, 120; *Bro.*, tit. Trespass, 99; *Dalt.*, Sheriff, 146; *Bro.*,

tit. Pledges, 28; Dyer, 67 b, in margin. When no other person has the right of possession, the property draws after it the possession in law, and possession is implied in him who has the right of possession. *Gordon v. Harper*, 7 T. R. 12, 13; *Ward v. Macauley*, 4 id. 489. The books are full of authorities that trespass will lie against the officer who takes a stranger's goods in execution, either out of the actual or constructive possession of the plaintiff. *Hallett v. Byrt*, *Carthew*, 381, where Lord Holt says: "There is a difference between replevin and other process of law, with respect to the officers; for, in the first case, namely, in replevin, they are expressly commanded what to take, in specie; but, in writs of execution, the words are general, namely, to levy of the goods of the party, and therefore, 'tis at their peril if they take another man's goods; for, in that case, an action of trespass will lie." So, in the Year Book, 11 H. 4, 91, cited in 2 Rolle's Ab. 552: "If a bailiff of a court attach the party by the goods of another man, trespass lies against him, for he ought to take notice of the goods of the party." "So, if he attach the servant, by the goods of his master, being in possession of the servant. 11 H. 4, 90 (b), 91, (b). The law is the same, if the sheriff, upon an execution, takes the goods of a stranger." *Wale v. Hill*, 1 Bulstrode, 149; *Coote v. Lighworth*, *Moore*, 457; *Turbane's Case*, *Hardres*, 323; *Sanderson v. Baker*, 3 *Wilson*, 309; S. C., 2 W. Bl. 832; *Bloxham v. Olden* 1, *Burr.* 26; *Cooper v. Chitty*, 1 id. 30; Bro. Ab., *Trespass*, 135; 19 H. 6, 80; *Ackworth v. Kempe*, *Doug.* 40; *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East, 328, and *Farr v. Newman*, 4 T. R. 633.

In the present case of *Williamson v. Ringgold*, the simple question submitted to the court is, whether the mere fact that the defendant took and detained the goods of the plaintiff, under color of an execution against Wells, is sufficient ground to justify the court in quashing the replevin. The court must suppose the strongest case against the defendant, namely, that he took the goods from the possession of Williamson, the plaintiff in replevin. Being of opinion that it is a general principle of the common law that replevin cannot be maintained in all cases where the plaintiff's goods have been wrongfully taken from his possession, and that the exception of goods taken in execution applies only to the debtor himself, I think that the motion to quash the replevin, on

the ground that the goods were in the custody of the law when the replevin was served, and also the motion for a *venditioni exponas*, ought to be **OVERRULED**.

MORSELL, J., concurred; THURSTON, J., dissented.

*Same Subject—Trespass on the Case.**

**EMIGH v. PITTSBURGH, FORT WAYNE AND CHICAGO
RAILROAD COMPANY.**

4 Bissell, Circuit Court for Indiana,

114-116. 1867.

MCDONALD, J. This is an action on the case for wrongfully putting the plaintiff off a train of the defendant's passenger cars. There are two counts in the declaration, and a demurrer to the whole declaration is filed, for the cause that there is a misjoinder of counts. The first count is undoubtedly in case. But the defendant insists that the second count is in *assumpsit* and not in case. The charge in the second count is substantially as follows: That the defendant was a common carrier of persons from Pittsburgh through Indiana to Chicago; that for a valuable consideration paid to the defendant, the defendant agreed with the plaintiff to carry him over said road from 1866 to 1870, giving him annual passes so to be carried; that in March, 1867, the defendant received the plaintiff on the defendant's cars at Pittsburgh to be carried on said road to Fort Wayne, in pursuance of said agreement, and carried plaintiff to a point within five and one-half miles of Fort Wayne, when the defendant (having before refused the plaintiff said annual pass) by an agent of the defendant, and then the conductor on the train, refused to carry the plaintiff any further, unless he would pay fare for his passage; that the plaintiff insisting on his right under said agreement, the conductor stopped the train in the open country far from any depot, and there, by threats of violence, obliged the plaintiff to quit the train, and left him with his baggage, where he had no means of

*See Sec. 1587, Vol. 10, Cyclopedia of Law.

conveyance to the place whither he was bound, at the dawn of day and exposed to the cold; and that by reason of the premises he suffered, etc., and was delayed in his business, etc., and sustained damages to the amount of \$5,000. The defendant insists that this count is in *assumpsit*, because it is founded on a contract. It does, indeed, by way of inducement set out a contract. But, if that circumstance necessarily destroys its character as a count in case, then the first count is in the same predicament, for it also sets forth a contract, and a contract, too, very similar to the one in the second count.

As I understand it, the subjects proper for action on the case are of two distinct classes. First, where there is a tort committed without force, on the person, character or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either expressed or implied, from which a common-law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus if a lawyer or a physician is engaged by special contract to render professional services, and if, in the performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract. So this form of action lies against agents, wharfingers and common carriers, whether they be acting under a contract express or implied. Indeed, nothing is more common in the common-law courts than the action on the case against common carriers of goods, though their engagements are always on contract, express or implied. If I hire a man to carry goods from Indianapolis to Cincinnati, and he wrongfully leaves them on the way at Lawrenceburgh, no lawyer will doubt that an action on the case will lie for this breach of duty.

The present case is that of a common carrier of persons; but can there be any difference on the point in question between the carrier of men and the carrier of merchandise? The authorities to this effect are numerous. I need only cite one, Chitty's Pleadings, 132-4, and the cases there referred to in support of the doctrine. I entertain no doubt that both the counts in the declaration are properly counts in case.

THE DEMURRER IS THEREFORE OVERRULED.

*Same Subject—Assumpsit.**

METCALF v. ROBINSON.

2 McLean (Circuit Court for Indiana)

363-365. 1841.

Opinion of the Court. This action was brought on a bill of exchange for \$627.33, drawn by the plaintiff on the defendant, accepted by him and protested for non-payment. The first count of the declaration complains, etc., of a plea that the defendant render unto the plaintiff \$1,000, which he owes and unjustly detains from him. For that whereas, etc., setting out the bill, its acceptance and protest for non-payment. And that the plaintiff, as drawer, was forced and obliged to pay the holder, etc., of which the defendant had notice, "by means whereof said defendant then and there became liable to pay said plaintiff said sums of money; and being so liable, he, the said defendant, then and there undertook and promised to pay," etc.

The second count states that the defendant was indebted to the plaintiff for so much money, etc., had and received to and for the use of the plaintiff at defendant's request. And, also, in the further sum of \$700 for money laid out and expended, etc., and, being so indebted, he, the said defendant, in consideration thereof, then and there undertook and promised to pay to the said plaintiff said sums of money, when he, the said defendant, should be thereunto requested. Yet the said defendant has refused, etc., to the damage of the said plaintiff \$200.

To this declaration the defendant demurred, and assigned as cause of demurrer a misjoinder, the first count being in debt and the other in *assumpsit*.

The forms of a declaration in an action of indebitatus assumpsit, and in debt on simple contract, are very similar. There are, however, certain words by which they are distinguished, and which give the one or the other character to the action. The action of debt is founded upon the contract, the action of assumpsit upon the promise, and in this consists the principal distinction between the two actions.

*See Sec. 1588, Vol. 10, *Cyclopedia of Law*.

In the action of debt on simple contract, express or implied, the subject-matter of the debt should be described precisely as in the common counts in assumpsit. The consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration, and it should be stated the party agreed to pay. Stating that he promised to do so would be bad. Emery v. Fell, 2 Term R. 28; 2 Bos. & Pul. 78.

In the case of Brill v. Neele, 3 Barn. & Ald. 208, the record stated that the plaintiff had brought his bill, etc., in a plea of debt, and the commencement of the declaration was in the common form in debt. The first count then stated that defendant was indebted to the plaintiff for work and labor, etc., and being indebted, that the defendant undertook and promised to pay upon request, etc. The second count was upon a *quantum meruit*, and in form like the first. The other counts were properly framed in debt. To this declaration there was a demurrer, assigning for cause the misjoinder of debt and *assumpsit*. In support of the demurrer the case of Dalton v. 2 Smith, 618, was cited, where the court held a declaration containing counts precisely similar to be bad; and Lawrence, Justice, there said that the counts laid with a promise were counts in *assumpsit* without a breach.

There can be no doubt that in the case under consideration the counts were intended to be in debt. This is plainly seen from the general form and language of the counts. The damages are laid at the conclusion of the declaration, as in debt, in a less amount than the sum demanded. But in both counts it is alleged that the defendant, "in consideration thereof, undertook and promised to pay." This, under the above authority, makes the counts *assumpsit*. They are counts in *assumpsit* without a breach. The breach assigned in the last count, which lays the damages at \$200, when the amount demanded is the sum of \$1,000, is wholly irregular. **LEAVE GIVEN TO THE PLAINTIFF TO AMEND HIS DECLARATION.**

*Same Subject—Trover.**

SIMMONS v. SPENCER.

3 McCrary, Circuit Court for Colorado,

48-53. 1881.

HALLETT, J. The first and second counts of the complaint set forth, in substance, a sale of certain property, which the plaintiff alleges belonged to him, and conveyances from the plaintiff to McCartney, and from McCartney to the defendant Spencer, which conveyances were deposited with the Merchants' and Mechanics' Bank of Leadville, to be delivered upon payment of a sum of money, amounting to \$20,000, for the use of the plaintiff. By instructions given upon the leaving of the deeds with the bank, the money was to be deposited to the credit of the plaintiff in this suit. Plaintiff received \$7,000 of this sum, and \$13,000, which was afterwards paid by the purchaser, whoever he may be, was not by the bank placed to the credit of the plaintiff, but was, in fact, turned over to the defendant Spencer. And upon this state of facts it is claimed that a liability has arisen upon the part of all the defendants to pay the plaintiff this sum of \$13,000. The structure of these two counts is for money due upon a contract; for money had and received by the defendants to the plaintiff's use. Nothing is said about any conversion of the money by the defendants to their own use, and there is nothing in the counts to indicate that they are based upon the theory that a tort was committed by the defendants in receiving this money and appropriating it in the way in which it is alleged they disposed of it.

In order to maintain an action as for money had and received it must appear that the money was *jointly* received by all the defendants, and upon that the law may imply a promise on the part of all to pay it to the rightful owner; and although, upon the facts stated here, there may be a liability in that form of action against Spencer alone, or against the parties constituting the Merchants' and Mechanics' Bank of Leadville alone, there cannot be a joint liability on the part of all these persons in that form

*See Sec. 1589, Vol. 10, Cyclopedia of Law.

of action, because they did not jointly receive this sum of money. The allegation is, in these counts, that the money was received by the Merchants' and Mechanics' Bank of Leadville, and by it wrongfully and fraudulently turned over to the defendant Spencer. That may make a liability as for money had and received on the part of these parties, severally,—that is, upon the part of the persons constituting the bank and upon the part of Spencer, severally; but it cannot be a liability arising by contract on the part of all of them, because they did not jointly and collectively receive this money.

As to whether the action may be maintained against them jointly as for a tort,—in substance, as an action of trover,—there is some doubt. *It is laid down in the case of Orton v. Butler, 5 B. & A. 652, that on a money demand merely to allege that the defendant received money and afterwards converted it to his own use, which is the form of the declaration in an action of trover, the action cannot be maintained, because, they say, to allow that would be to defeat the defendant's right to set-off; and that the action of trover can only be maintained where the specific thing for which suit is brought can be identified; and that it must be possible in such case, where an action of trover is brought, for the defendant to relieve himself from all liability of tendering the property for which the action is brought to the plaintiff; as, for instance, when it is brought for a horse, he may surrender the horse and relieve himself from liability.*

The same view is taken in several cases in Croke's Elizabeth; and there are cases—one in 4 E. D. Smith (N. Y.), *Donahue v. Henry, 162*—which declare that when a sum of money has been received which belongs to the plaintiff in the suit, and concerning which it is the duty of the defendant to turn over the very sum which he received to the plaintiff, *the very money, the same dollars and the same bills*, if he received it in that form, that then, if he makes any other disposition of it, the action of trover may be maintained. *Petit v. Bonju, 1 Mo. 64*, is a case in which the plaintiff brought an action in that form, against parties who were conducting a lottery, claiming that he had become entitled to a sum of money as the holder of a ticket in the lottery, and that they had wrongfully refused to pay it over to him, and seeking in trover to recover the amount. *The court say, in that instance,*

that if, in fact, any sum of money had been set apart to the plaintiff—\$100, I think, was the amount—if it had been parceled off by itself, by the defendants, as his money, and afterwards they had taken those dollars and converted them to their own use, he might bring an action of trover for the dollars so parceled off; but that he could not, upon the general charge that so much money was due to him and wrongfully detained by the defendants, maintain that action. His action must in that case be in the form of an action on contract, if he would recover at all.

That is the distinction that I think is recognized in all of the cases, and, applying it to the present case, it may be true that the defendants, the Bank of Leadville, as to the very bills, notes or coin, if it was such, which they received for this property, may be liable in an action of trover or an action founded in tort for the conversion of that money, if it be so alleged in the complaint. And if that money—the very same money—was paid over to Spencer, he also would be liable, and then in that case they both might be joined in one action as tort-feasors. To illustrate, I will read a paragraph from Bliss on Code Pleadings: “Under the code, an action for the recovery of personal property will lie against one who has wrongfully parted with the possession of property jointly with one in actual possession.” Sec. 83.

And the same principle applies to trover: “Thus, one who has wrongfully pledged plate belonging to the plaintiff is liable to an action of detinue, jointly with the person to whom it had been pledged. So, where one has fraudulently obtained a credit upon a bill of goods and assigned them over for the benefit of his creditors, the vendor having the right to repudiate the sale and pursue the goods may make both the purchaser and his assignee parties to an action for their possession.” Id.

For this the case of *Nichols v. Michael*, 23 N. Y. 264, is cited. The principle declared is that where a party has the right to a specific thing, and he can pursue that particular thing through several hands, he may charge all of these parties consecutively or all who held the property consecutively, in one action for its value. So that here, if it be true that the Smiths, or the persons who constitute the Merchants’ and Mechanics’ Bank, received this money and turned over the same money to Spencer, they may be jointly charged in proper phraseology as for converting

that money, but not otherwise. And it must be the identical money.

These cases, and all the authorities that I have been able to find, go to the point that where an action is founded in tort and maintained upon that principle, it must be for the conversion of the specific thing, and it can only be maintained where the property itself can be traced to the hands of the party to be charged.

In that aspect, if the facts are truly stated in the first and second of these counts, no joint action can be maintained against these parties unless the pleader may be able to allege that the same money came to the defendants, the Merchants' and Mechanics' Bank of Leadville, and the defendant Spencer, successively. The plaintiff must allege that it was the same money, and that the defendants converted it to their own use, in order to make it an action for tort.

Upon the other theory there is no difficulty in maintaining an action against either of the defendants separately as for money had and received, and upon that principle, the third count, which states nothing as to the way in which the money came to the hands of the parties, but merely charges that the defendants are liable to the plaintiff for \$13,000 received by them for the use of the plaintiff, is not open to any objection.

The ruling upon the demurrer, therefore, must be that it is sustained as to the first and second counts, because there the facts are stated which show that the defendants cannot be jointly liable, and overruled as to the third count, because nothing appears in that count to indicate that they may not be jointly liable.

If I have made myself understood, it will be apparent that the plaintiff must amend so as to make this substantially an action of trover for this sum of money against all these parties, or by dismissing his action against one or the other of the defendants. If the action were dismissed as to Spencer, or as to the defendants who constitute the Merchants' and Mechanics' Bank of Leadville, I would see no difficulty in maintaining it against the other.

ABBOTT v. McCARTNEY.

*1 Holmes, Circuit Court for Massachusetts,**80-84. 1871.*

Trespass de bonis asportatis for a wagon. On November 20, 1868, the plaintiffs attached the wagon on a writ in their favor against the New England Express Company. Under a Massachusetts statute which authorizes the sale of property attached on meane process, the sheriff who made the attachment caused the wagon to be sold by auction on December 9, 1868, on the premises of one Johnson, where the wagon then was. The plaintiffs bought it under an agreement between them and the sheriff that they need not pay for it until the suit between them and the express company should be decided. After the sale Johnson was instructed by the sheriff not to deliver any articles unless the purchaser should bring a receipt showing that they had been paid for. On January 6, 1869, they gave the sheriff a due bill for the wagon.

On November 13, 1868, the express company made their monthly return of receipts, showing a tax due the United States, and on December 19, 1868, the defendant, a United States collector of internal revenue, distrained the wagon for non-payment of the said tax, and notified the express company thereof; and on January 2, 1869, he sold the wagon at public auction. At the time of distraint the wagon was still on the premises of Johnson, and the plaintiffs knew nothing of the distraint, or of the sale thereunder, until after they had paid for the wagon.

SHEPLEY, J. It is contended on the part of the defendant that the plaintiff, upon the facts in this case, is not entitled to maintain an action of *trespass de bonis asportatis*. So far as the form of action is concerned, the principle of law contended for by the defendant is undoubtedly correct.

The general principle of law is that, in order to sustain an action of trover or trespass de bonis asportatis, the plaintiff must have had, at the time of the alleged taking or conversion, either possession or a right to the immediate possession of the goods; such a right as to be entitled to reduce the goods to possession when he pleased to do so. Bloxam v. Sanders, 4 B. & C. 941;

Smith v. Miller, 1 T. R. 475, 480; Ward v. Macanley, 4 T. R. 489; Putnam v. Wyley, 8 Johns. 432; Mugridge v. Eveleth, 9 Met. 233. Defendant contends that plaintiffs had not either property, possession or the right to immediate possession at the time of the alleged taking. He claims that the property of the express company had not been divested, and did not pass to the plaintiffs, for the reason that the sale to them was on credit, and that there was no actual delivery of the property. He contends, further, that the possession of Johnson was not the possession of the plaintiffs, and that the plaintiffs have not the right to possession until they paid the price; the officer having a special property in the goods until paid for.

The case of Prouty v. French, 2 Pick. 586, is relied upon to show that no property passed by a sale upon credit made by an officer. The case of Prouty v. French was the case of a conditional sale on credit on execution. There a speedy sale was indispensable, and the proceeds were needed for the immediate satisfaction of the execution on which the sale had been made.

The sale in this case was regulated by an entirely different statute, which provides for a sale on meane process whenever the parties consent in writing, or whenever the property attached on meane process may be liable to perish, waste or greatly depreciate in value by keeping, or cannot be kept without great and disproportionate expense. The object is to hold the goods or the proceeds, in some form or other, till judgment shall be rendered. In reference to such a sale, the supreme court of Massachusetts (Morton, J.) say, in Crocker v. Baker, 18 Pick. 407, 412: "We do not perceive that the credit given by the officer forms any objection to the validity of the sale. The goods would not sell for less on a credit than they would for cash. The officer might, and probably would, make himself responsible for the price. But neither debtors nor creditors would be liable to suffer. Nor does the statute, expressly or by implication, prohibit this mode of sale."

The proceedings of the officer being legal, the property vested in the purchasers. There was an agreement between the sheriff and the plaintiffs that they should have credit on their purchases until the suit was decided. Where goods are sold, and nothing is said as to the time of delivery or the time of payment, and every-

thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. *Bloxam v. Sanders*, 4 B. & C. 941. After the sale the purchaser on credit was immediately entitled to the possession, and his right was not divested by the general instructions given by the officer and the auctioneer to the stable-keeper after the sale, not to deliver the articles sold to the purchasers until they should bring a receipt from the auctioneer showing they had been paid for. Abbott, the purchaser, had, under his agreement for credit, a right of immediate possession against the officer, subject only to be divested by the insolvency of the purchaser and a stoppage *in transitu* by the vendor. Consequently he had the same right as against the stable-keeper, who was but the servant of the officer or auctioneer, as he was not a party to the instructions given to the stable-keeper, and does not appear to have assented to them.

After the sale the express company was neither the owner nor the possessor of the property sold. The ownership was in the purchaser, and the possession was in the stable-keeper, as the agent of the officer or the auctioneer or the plaintiffs, certainly not as the agent of the express company.

The notice, therefore, of the sale by the collector of internal revenue, not having been given as required by law to the owner or possessor of the property, was insufficient, and the collector, at the time of the sale having no paramount lien on the property sold, must be considered as a trespasser. After the sale on execution the sheriff became accountable for the proceeds of the sale. Any surplus of funds in his hands, beyond what might be required to satisfy the execution issued in the suit on which the property was attached and sold, would be liable to subsequent attachment; but the mere fact that there was no actual de-

livery to the purchaser would not let in another creditor to a priority of title. The case of *Lanfear v. Summer*, 17 Mass. 119, has no application to a case of this kind. *Judgment for plaintiffs.*

*At Common Law the Pleader Must Not Make a Mistake in Choosing Form of Action.**

SUPERVISORS OF KEWAUNEE COUNTY v. DECKER.

30 Wis. 624. 1872.

Appeal from the circuit court for Kewaunee county. Action for recovery of money alleged to belong to the county of Kewaunee, and to have been converted by defendant Decker to his own use, he being the clerk of the plaintiff board of supervisors. The opinion states the case. Defendant having demurred to the complaint for insufficiency, the demurrer was overruled, and defendant appealed.

DIXON, C. J. *It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one count of declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness what he was called upon to meet. The proposition that a complaint, or any single count of it, may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the*

*See Sec. 1591, Vol. 10, Cyclopaedia of Law.

legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion.

Counsel for the defendant in this action suppose the complaint herein to be intended and to be one in trover, charging or seeking to charge the defendant with the wrongful conversion of certain moneys which came into his hands as a public officer, and which belonged to the plaintiff, and, acting upon such supposition, they have demurred to the complaint as not stating facts sufficient to constitute that cause of action. It would be unfair to say that the learned counsel for the plaintiff equivocate on the point, nor is it true that they take issue with the counsel for the defendant as to the nature of the complaint. They rather concede than otherwise, that the complaint is and was intended to be one in tort for the conversion, but they at the same time insist, that if it is not good as a complaint of that kind, it is sufficient as a complaint or count in an action for money had and received, and being sufficient for that purpose, they argue that the demurrer was properly overruled, and the order of the court below should be affirmed on that ground. In other words, their position is that it is a question now open to speculation and inquiry on this demurrer, whether, upon all or any of the facts stated in the complaint, taken collectively or separately, or even by severing the allegations themselves, so as to eliminate or discard certain portions of them as surplusage, a cause of action of any kind is or can be made out, and, if it be found that it can, then the demurrer should be overruled. To show that the complaint may be upheld as one for money had and received for the use of the plaintiff, and the action considered as one of that kind, counsel gravely contend that the averments that the defendant made fraudulent representations, and acted falsely, fraudulently and wrongfully, in claiming and withholding the moneys, and that he converted the same, etc., may be disregarded and rejected as surplusage.

In support of this position counsel cited several New York decisions, and some in this court, where, after trial and judgment, or after issue has been taken upon the merits, or after the trial has commenced and the plaintiff's case is closed, it has been held that such allegations may be disregarded. The decisions were in actions like the present and others involving a somewhat similar question under the circumstances above stated, and were

made in favor of a good cause of action, proved or proposed to be, and which by a fair and reasonable interpretation of the pleadings could be said to be within the scope of them, or to be fairly mapped out and delineated by the averments, so that the defendant was apprised of the demand made against him and of the facts relied upon to establish it. The great liberality of the code, and the broad powers of amendment conferred and enforced upon the courts under such circumstances, are well known. It is declared that no variance between the allegation in a pleading and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon the merits, and that when the variance is not material, the court may direct the fact to be found in accordance with evidence, or may order an immediate amendment without costs. Most liberal provision is also made for amendments in other respects, by adding to or taking from the pleadings before or after judgment, in furtherance of justice. Where an answer is put in, it is provided that the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. And it is furthermore declared that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect. These provisions, for the most part, if not entirely, relate to the proceedings in an action after issue joined on the merits, upon or after the trial, or after judgment on the merits, when the facts are made to appear and the substantial rights of the parties are shown. They are enacted in amplification and enlargement of the rules of the common law on the same subjects, by which it is well understood there were many defects, imperfections and omissions, constituting fatal objections on demurrer, which were used after issue joined and a trial or verdict or judgment on the merits. The cases cited by counsel are all of them manifestly such as fall within these provisions and rules, and none of them touch or have any bearing upon the question or case here presented. No case arising upon demurrer to the complaint is cited, and it is believed none can be, holding any such doctrine as that contended for. Most of the cases were where no

objection was taken until after issue joined and trial had, and judgment rendered on the merits, and then the objection was brought forward as a ground of reversal and generally in the appellate court, that the plaintiff had declared in tort and had recovered on contract, or *vice versa*, or had sued in equity and recovered a judgment at law, or that equitable relief had been granted in an action commenced and tried as one on the law side of the court. In all the cases the objection had been waived by failure of the party to take it properly and in season, and under the liberal powers of amendment and curative provisions of the code, it was held that the proceedings or judgments, just in themselves, should not be disturbed upon points of mere form. Further or more particular comment upon the case is deemed unnecessary. It suffices to repeat the references as found in the printed argument of the counsel. *Barlow v. Scott*, 24 N. Y. 40; *Byxbie v. Wood*, id. 607; *Austin v. Rawdon*, 44 N. Y. 63; *Greason v. Keteltas*, 17 id. 491; *Emery v. Pease*, 20 id. 62; *Conaughty v. Nichols*, 42 id. 83; *Wright v. Hooker*, 10 id. 51; *Walter v. Bennett*, 16 id. 250; *Stroebe v. Fehl*, 22 Wis. 347; *Hopkins v. Gilman*, id. 481; *Tenney v. The State Bank*, 20 Wis. 152; *Leonard v. Rogan*, id. 540; *Samuels v. Blanchard*, 25 id. 329; *Vilas v. Mason*, id. 310, 328.

It thus appears that the authorities relied upon do not sanction the position that a complaint in the first instance, and where challenged by demurrer, may be uncertain and ambulatory, purposely so made, now presenting one face to the court, and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity, as he is pleased to name it, and the necessities of argument require, and if discovered to be good in any of the terms of phases which it may thus be made to assume, that it must be upheld in that aspect, as a proper and sufficient pleading by the court. As already observed, the opinion of the court is quite to the contrary. We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. Howland v. Needham, 10 Wis. 495-498. These distinctions, continuing, they must be regarded by the courts now as formerly, and now no more than then, except under the peculiar circumstances above noted, can any one com-

plaint or count be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be "fish, flesh, or fowl" according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading, it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine, with precision and certainty, upon inspection of the pleading, to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it, within the class, must also be determined. See *Clark v. Langworthy*, 12 Wis. 441, and *Gillett v. Treganza*, 13 Wis. 472.

This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict. It is in harmony with those decisions which have been made, that an application to amend should be denied, which proposes to entirely change the cause of action sued upon, or to introduce a new one of a different kind. *Newton v. Allis*, 12 Wis. 378; *Sweet v. Mitchell*, 15 id. 641, 664, and 19 id. 528; *Larkin v. Noonan*, 19 id. 82; *Stevens v. Brooks*, 23 id. 196. It is in harmony with the decision in *Scheunert v. Kaehler*, 23 Wis. 523, where, upon demurrer to the counter-claim of the defendant, the court inspected the complaint and determined the nature of it, and said that "the subject of the action is the tort or wrong which was committed in the conversion of the money. That is the foundation, and sole foundation, of the plaintiff's claim in this form of action; for unless the money was unlawfully converted, the action cannot be maintained." Counsel criticise this language and say it is inconsistent with some of the cases first above cited. We answer clearly not, when correctly understood and applied, that is, in case proper objection was taken to a recovery upon any other ground, or upon any proofs short of those establishing the cause of action stated in the complaint. Counsel say, however, and we think with entire correctness, that after demurrer sustained to the counter-claim, as was there done, on the ground that the complaint was in tort, there could be no recovery in the action except for a tort. The greatest injustice might result to the

defendant, if this were not so, or, if having been deprived of his counter-claim on the ground that the action was in tort, the plaintiff should afterwards be permitted to recover against him as upon contract. And the same view is also in keeping with the decision of this court recently made in *Anderson v. Case*, 28 Wis. 505, where in an action *ex delicto* for the seizure and conversion of certain personal property, the plaintiffs claimed that the judgment appealed from should be affirmed by this court, as one for money had and received, being the proceeds of the sale of the property by the defendants which the evidence on the trial showed had been made and the price received by them in money. But it was held against the plaintiffs, and the judgment was reversed because of the substantial difference between the action for the wrongful conversion, and the action for money had and received, and because, in the former, execution goes against the body of the debtor as well as his property, while in the latter it goes only against his property. That decision is authority for the position that to justify the rendition of judgment upon proof of liability *ex contractu*, where the form of action is *ex delicto*, the proceedings must be changed by amendment so as to conform to the facts proved and the nature of the cause of action established, or otherwise that the judgment itself must distinctly specify and show that the recovery was upon contract and not in tort.

And directly also in support of the same view, that the court must ascertain and decide definitely what the character of the pleading is, and the nature of the cause of action stated in it, or intended to be, is the late case of *Lee v. Simpson*, 29 Wis. (June T. 1871), which likewise arose on demurrer to the complaint. And see also *Ragan v. Simpson*, 27 Wis. 355, where it was held, in an action for unlawful detainer taken by appeal to the circuit court, that the defense set up and proved, that one of the defendants was a mortgagor in possession, with right to redeem, could not be treated at the instance of the plaintiffs as an action by the defendants, or one of them, to redeem from the mortgage, but that the defendants were entitled to a judgment of dismissal.

But the language in our own reports which most nearly indicates the true rule of law and practice in cases of this nature, is that of Mr. Justice Paine, in *Samuels v. Blanchard*, *supra*, where,

speaking of the complaint in that case, he says: "If the question had been presented properly at the preliminary stage of the case, the character of the summons, taken in connection with the form of the allegations of the complaint, might have required it to be decided that the action must be in strictness regarded as upon contract." And again he says: "The facts that if the action was considered as one upon contract, the objection appeared on the face of the complaint, and might have been taken advantage of by demurrer, and that no demurrer was interposed, and that both parties introduced fully their evidence as to the whole controversy, in the absence of anything showing that this distinct question was raised at all in the court below, we think sufficiently establish the claim of the respondent's counsel, that it was tried there as an action of tort, without objection, and must be so treated here."

The foregoing language indicates, not only that the sufficiency of the pleading must be determined on demurrer to it, but also the true nature and object of it, or what the particular kind or cause of action stated is, or is designed to be, and that for this purpose the character of the summons may be taken into consideration, in connection with the form of the allegations of the complaint. And this we take to be the true rule, that the court must, in the first instance, decide with certainty what the specific cause of action counted and relied upon is, and, having decided that, it must next determine whether the complaint contains a sufficient statement of such cause, and if it does not, the demurrer must be sustained. In the present case the summons is for relief, and not one for a money demand arising on contract. The summons is appropriate, therefore, only to the action of tort or for damages for the wrongful conversion of the moneys. It corroborates the intention of the pleader, as shown by the allegations of the complaint, to sue in that form of action, and from both we think it clearly enough appears that the action is and was designed to be in tort and not upon contract; and by this standard, or by the rules of pleading which should govern in an action for the wrongful conversion of the moneys, must the sufficiency of the averments be tested.

Considered as an action of trover, or one sounding in damages for the tortious conversion of the moneys, the complaint is in sev-

eral respects faulty and imperfect. For the purpose of showing the tort or characterizing the conduct of the defendant as improper and wrongful, and thus to establish a conversion of the moneys, or a portion of them, or the "excess" received from the sale of the tax certificates belonging to the county, the complaint charges that the defendant converted such moneys to his own use "falsely and fraudulently, claiming he had sold said certificates, as agent of said county, for the sums specified on their face, and for no more, or wrongfully and unlawfully claiming that as such agent of said county he was entitled to any excess he might receive on such sales over and above the amount specified on the face of said certificates," etc. And again, for the purpose of giving like character to the conduct of the defendant and showing the wrong, it is charged that the resolution of the board of supervisors of the county of the 9th day of January, 1869, was passed by mistake on the part of the board, and "by and on account of the fraudulent representations of the defendant, and that in adopting the resolution the board acted entirely upon the fraudulent statements then and there made by the said Decker." The allegation first referred to is in the alternative, itself a defect, but the serious objections to both are that they state no facts showing in what the fraud, falsity, or wrongfulness of the defendant consisted, or how he was guilty of them. A general charge that a party acted fraudulently, falsely or wrongfully, or that he made fraudulent representations or statements, amounts to nothing; there must be a specification of facts to justify it. It is at most but a mere inferential statement, too vague and uncertain to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it, or to inform the court whose duty it is to declare the law arising upon the facts. *Drum v. Holton*, 1 Pinney (Wis.), 456, and authorities cited.

With respect to the interest upon the redemption moneys paid to the defendant upon lands and lots sold for taxes, of which the county held the certificates of sale, which interest it is averred the defendant has not accounted for or paid over to the county, or to his successor in office, the charge is that, "although often requested so to do, he has heretofore refused and still does refuse so to do, and has converted the whole thereof to his own use."

The conversion of the moneys received for illegal assessments is similarly charged.

And near the close of the complaint, and referring to all the money mentioned in it, for the conversion of which the action is brought, the demand and refusal relied upon to show conversion is alleged in these words: "On or about the 2d day of June, A. D. 1870, the said board of supervisors made and caused to be made a demand upon the said Decker, that the said Decker pay over to the county of Kewaunee the balance of all moneys remaining in his hands, and received by him as such clerk and agent as aforesaid, which said Decker then and there refused and neglected to pay over." The defendant, it appears, had been clerk of the board of supervisors of the county for several consecutive official terms, during the period of twelve years, commencing on the 1st day of January, 1858, and the moneys alleged to have been received and not accounted for, or paid over, but converted by him to his own use, are averred to have been paid to him in his capacity of clerk on divers days and times after the 1st day of January, 1858, and before the 1st day of January, 1869. The only accounting and settlement between the defendant and the board of supervisors, averred in the complaint, was on the 9th day of January, 1869.

The complaint does not aver that no other accounting was had or settlement made, and, in the absence of such averment, the presumption must be, we think, that the defendant rendered his accounts and settled with the county board at the end of each year, as required by law. This presumption arises from the public official character of the parties, both of the defendant and the board of supervisors, nothing to the contrary having been averred in the complaint or admitted by the defendant. It is the ordinary presumption in favor of the correctness of official action, and that public officers do their duty.

In *Cotton v. Sharpstein*, 14 Wis. 226, which was an action like the present, except that the agency was merely a private one, it was stated as a *quære*, whether a count alleging merely that the defendant collected certain money for the plaintiff as his attorney at law, and had not, though often requested, accounted for or paid it to the plaintiff, contained a sufficient allegation of a conversion.

In a case like the present, where the moneys alleged to have been converted consist of some thousands of small sums or items received through a period of ten years by a public officer. The specifications of which, in a schedule annexed to the complaint, constitute a ponderous document of nearly 2,300 folios of written matter, and where, in presumption of law at least, ten annual accountings and settlements, embracing or which might have embraced the same sums or items, have taken place, it is not too much, we think, to say that the general averment, "that the defendant, though often requested so to do, has not accounted for or paid over the moneys, but has refused, and still does refuse to do so, and has converted the same to his own use," is not a sufficient averment of facts to show a conversion of the moneys. Neither do we think that a general averment, as above shown, of a demand and refusal is sufficient, nor that the facts being admitted, as there pleaded, constitute sufficient evidence of a conversion.

The request, in order to put the defendant in default, and to show that he has been guilty of a conversion in such a case as this, ought to be a particular request, from which it would appear that his attention was called to the very sums or items and all of them which it was claimed he should have accounted for and paid over, but had not; and it should furthermore appear that reasonable time and opportunity was afforded him to examine them, and to inspect and compare the public records, documents and vouchers, and that then he had wrongfully refused to account for and pay over the moneys. The request should be such as to show that the defendant had full and fair opportunity to correct the accounts, if satisfied that they were erroneous, and to tender or pay over the moneys and save the costs of an action, and the facts pleaded should be as comprehensive and explicit as the proofs to be made upon the trial.

And the allegation of demand and refusal is equally defective and for the same reasons. The demand was that the defendant pay over "the balance of all moneys remaining in his hands, and received by him as such clerk and agent as aforesaid." It does not appear that the defendant was informed what the balance was, or was claimed to be, or in what it consisted, or how it was made up, or that any means or facilities were afforded him for ascer-

taining. He was required, at the peril of being charged in tort for the conversion, to pay over the balance, without even being told, in round numbers, what the balance claimed was. The demand should have been in all respects what we have said the requests should be, for both, in case of this kind, serve the same purpose.

If, instead of this action in tort, the defendant had been sued upon his official bond or bonds, for not accounting for and paying over the same moneys, and breaches had been assigned in the same words as in this complaint of request and refusal, or demand and refusal, such assignments would have been bad on demurrer, as showing no violation of the conditions of the bonds. Board of Supervisors of Iowa County v. Vivian, Treasurer, and others, 31 Wis. 217; Supervisors, etc., v. Kirby, 25 Wis. 498; Wolf v. Stoddard, id. 503. It would be something very remarkable in the history of Pleading, should it be held that the same facts, which would not constitute a breach of the official bond of a public officer in not accounting for and paying over public money in his hands would constitute a tortious and wrongful conversion of the same moneys for which an action *ex delicto* might be maintained against him. We think no statement of facts, in a case like this, not sufficient to show a breach of the official bond growing out of the same transactions, will be sufficient to show a conversion of the moneys.

BY THE COURT—ORDER REVERSED AND CAUSE REMANDED.

CHAPTER III. OF THE JOINDER AND ELECTION OF ACTIONS.*

FRENCH v. TUNSTALL.

Hempstead, 204. 1832.

Appeal from Chicot Circuit Court, determined before Benjamin Johnson and Edward Cross, Judges.

The declaration contains two counts. The first is the common count in an action of *assumpsit* for money lent and advanced by the plaintiff to the defendant. The second is also in the form of a count in *assumpsit*, upon a promissory note under seal. The defendant filed a general demurrer to the declaration, which was sustained by the court, and judgment rendered in his favor, from which the plaintiff appealed to this court.

If the declaration contains one good count, a demurrer to the whole declaration will not be sustained, unless there is a misjoinder of actions. The first count is in *assumpsit* and is clearly a good and valid count. It is equally clear that the second count is also in the form of a count in the action of *assumpsit*. It is true that the cause of action set out in the second count will not support an action of *assumpsit*; debt or covenant being the appropriate action upon a writing obligatory. But because the second count is faulty and defective, and might have been reached by a general demurrer, it does not follow that it is a count in debt, although it states a cause of action for which debt is the proper remedy.

We are of the opinion, then, that there is no misjoinder of actions, notwithstanding the second count is palpably defective and sets out no cause of action for which *assumpsit* will lie. The first count to the declaration being good, the demurrer to the declara-

*See Secs. 1600-1602, Vol. 10, *Cyclopedia of Law*.

tion should have been overruled. The case of Judin v. Samuel, 4 Bos. & Pul. Rep. 43, is, in principle, analogous to the present case. The declaration contained three counts. The first was in trover for bills of exchange, and the second and third counts, after stating the delivery of the bills to the defendant, in order that he might get them discounted for a certain commission, and his having got them discounted, stated that he converted and disposed of the money to his own use.

The defendant demurred generally, on the ground of a misjoinder of tort and contract, the subject of the two last counts being matter of contract; but the court held that, on a general demurrer, as all the counts were in the form of tort, judgment must be for the plaintiff if any one count was good. We think the principle decided in the above case is decisive of the case now before the court.

JUDGMENT REVERSED.

GARLAND v. DAVIS.

4 Howard, 131-155. 1845.

Error to the Circuit Court for the District of Columbia.

Mr. Justice WOODBURY. In the examination of this case a defect has been discovered in the pleadings and verdict which was not noticed in the court below nor suggested by the counsel here. And the first question is whether, under these circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversing the judgment and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced. But it is equally clear that when the whole record is before the court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. Roach v. Hulings, 16 Pet. 319. So it is the duty of the court to give judgment on the whole record and not merely on the

points stated by counsel. *Slacum v. Pomeroy*, 6 Cranch, 221; *Baird & Co. v. Maddox*, 1 Call, 257; 16 Pet. 319.

In *United States v. Burnham*, 1 Mason, 62, the court alone took notice of the defect which was the sole ground of its opinion. In *Patteson v. United States*, 2 Wheat. 222, it is stated that "the points made were not considered by the court, and judgment was pronounced on other ground;" and Justice Washington says (p. 24): "The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it;" and on that account the proceedings below were reversed. See, also, *Harrison v. Nixon*, 9 Pet., 483, 535.

Statement of Facts.—I proceed, then, to consider the nature and character of the difficulty in this case appearing on the record. Since discovering it, an opportunity has been given to the counsel for the original plaintiff, which has been improved, to attempt to remove it by argument and authorities. But it still remains and consists in this.

The declaration is an action on the case, sounding in tort. It sets out no contract except one by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We are required to take this view of the declaration, not only by the averments in it, but by both the present and past positions of the counsel for the plaintiff, that it was intended to be founded on a misfeasance. The plea, however, instead of being "not guilty," as was proper in such case (Com. Dig., Pleader), is *non assumpsit*, and the plaintiff below, not demurring thereto, nor moving for judgment notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue, and merely finds "that the defendant did assume upon himself in manner and form," etc., and assesses damages "sustained by reason of the non-performance of the promise and assumption aforesaid."

Beside the general reasoning in the books, that pleas amounting to the general issue should traverse the material averments in the declaration, and, where the action is one on the case for a

tort, should deny the tort by pleading "not guilty," it is laid down in most elementary treatises that "not guilty" is the proper general issue in such cases. See Com. Dig., Pleader. Beyond this, it has been actually adjudged in an action on the case, after full hearing, that *non assumpsit* was a bad plea. Noble v. Lancaster, Barnes' Notes, 125. That action was trover, but being still an action on the case, the same principle applied. Nor is the difference merely formal or technical between actions founded in tort and in contract. 1 Chit. Plead. 229, 418. Because, when in tort or *ex delicto* a set-off is not admissible nor can infancy be pleaded as to one *ex contractu*, nor can a plea in abatement be sustained, that all concerned in the wrong are not joined, as it may be in counts on contracts, and a writ of inquiry must issue to ascertain the damages, which is often unnecessary in suits on contract. A declaration is bad which unites a count in tort with one in contract. 2 Chit. 229, 230; 1 Chitty, 625, note; 4 D. & E. 794; 8 D. & E. 33.

Various other cases analogous to this might be cited, which tend to show that the present plea is improper, but it is not deemed necessary, in this stage of the inquiry, to enlarge on that point; and I proceed to the next and more difficult question, whether such a plea, though bad on demurrer, should not be considered as good after verdict, and cured by the statute of jeofails.

As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a defect of mere form, what may seem to be just. 1 Levinz, 32; 6 Mod. 1; Com. Dig., Pleader, 18; 6 Johns. 1.

Here, however, there appears to be no informality in a good plea. On the contrary it looks more like formality in a bad one. And if it be asked whether there are no cases or bad pleas which are cured by a verdict, we answer that several exist, but that they are cases where the pleas, though bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue the material parts of the declaration. That is the test.

In the opinion of the majority of the court the plea under consideration does not contain enough for that purpose; and my apology for examining this point somewhat more in detail must be found in the circumstance that the court are divided upon it.

The provision by congress in relation to amendments is to be

found in the thirty-second section of the judiciary act of September 24, 1789 (1 Stats. at Large, 91), and is similar to that in the 32 Henry VIII., but certainly not broader. See the former, in 1 Little & Brown's ed., 91, and the latter in 1 Bac. Abr., Amendment and Jeofail, B.

Under both of these statutes it has frequently been adjudged that defects in substance are not cured by a verdict; "for this," says Bacon (Abr., before quoted, E.), "would have ruined all proceedings in the courts of justice; and a defect in substance, in a plea or verdict, is conceded, in all the books, to exist when they do not cover "whatever is essential to the gist of the action."

The present plea, if tried by this test, seems not to be remedied by the verdict; because, so far from traversing all that is essential, nothing is denied, unless it be the inducement. Thus it traverses a promise simply; but the only promise set out in the declaration is one introductory to those material averments, which, as before stated, are the wrongful and injurious acts of the defendant. So far from denying those acts, the plea entirely passes them by, and they are neither put in issue, nor a verdict returned upon them one way or the other. It is true that, in some actions for a tort, a promise may be referred to in the declaration, which sometimes will constitute one material fact among several others. But it is only one, and not the whole, nor is it the most material fact; that being, in such cases, the misfeasance of the defendant. Nor does the verdict here find this one fact or promise such as averred in the inducement. There it is stated to be made by Mr. Franklin; but, on the contrary, the verdict finds a promise made by the defendant.

On recurring to precedents several are found which confirm these conclusions. In respect to pleas they show that, when so imperfect and immaterial as this, they are not cured by verdict. And the reason generally assigned, and which prevades the whole, is that before mentioned, namely, that they do not cover or traverse all the *gravamen* of the declaration. *Staple v. Heydon*, 6 Mod. 10; *Willes*, 532; *Tidd's Pr.* 827; *Gilb. C. P.* 146.

Hence it has been decided that a plea of *non assumpsit* to an action of debt is not thus cured (*Brennand v. Egan*, 4 Taunt. 164; *Penfold v. Hawkins*, 2 Maule & Selw. 606), because it covers too little or is irrelevant. While in pursuance of the same rule

it has been held that *nō debet to assumpsit* (1 Hen. Bl. 664), and "not guilty" either to *assumpsit* (Cro. El. 470, and 8 Serg. & R. 441), or to covenant (1 Hen. & Munf. 153), or to debt for a penalty (Coppin v. Carter, 1 B. & E. 462, note), are cured by a verdict because they contain enough to put in issue all which is important in the declaration.

In the present case the issue manifestly reaches only a part of the case and is therefore incurable (Hardress, 331); and it comes expressly within the definition of an immaterial issue, which is also incurable. Carth. 371; Bac. Abr., Verdict, K., 2 Levinz, 12; 2 Saund. 319; 2 Mod. 137; Gould's Pl. 506, 509. This is undoubted from Williams' definition in Bennet v. Holveck, 2 Saund. 319, a. He says: "An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and the court is often at a loss for which of the parties to give judgment."

So in Benden v. Manning, 2 N. H. 291, it is laid down on circumstances like the present, that "if, instead of *assumpsit*, a special action on the case had been brought for misfeasance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not." 5 D. & E. 143; 2 Wils. 359; 1 Saund. 312, note 2.

If we should next compare this plea and issue in their substance with a few others less general that have been solemnly adjudged to be bad, and not cured by verdict, though found for the plaintiff, the result will be the same.

It may be seen in Tryon v. Carter, 2 Str. 994, that, in debt on bond payable on or before the 5th of December, the defendant pleaded payment on the 5th of December, an issue being joined and found against him, the court still awarded a repleader, as it could not be inferred from these pleadings that payment may not have been made before the 5th.

See another in Enys v. Mohun, 2 Str. 847, where, to covenant on a lease to C., averred to come by assignment to the defendant, the plea was that C. did not assign to him, and the verdict was for plaintiff. But the court awarded a repleader, as the issue found

does not cover all the important points of the declaration, namely, that the lease may have come to the defendant, not from C. direct, but by mesne assignments. Same case in 1 Barnardiston, 182, 220. See also other cases. Yelv. 154; Beck v. Hill, 2 Mod. 137; Read v. Dawson, id. 139; Stafford v. Mayor of Albany, 6 Johns. 1; Com. Dig., Pleader, 1 and 2, V., 5; Chit. Pl. 625, 695; 6 D. & E. 462; 1 Saund. 319, n.

In Patterson v. United States, 2 Wheat. 225, Judge Washington lays down the whole law precisely as we view it in respect to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of the declaration. He says: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding so as to make it harmonize with the issue, yet if it appear to that court or to the appellate court that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict." And on error the proceedings below were reversed.

After all this, it is hardly necessary to state further, by way of precedent, that in Noble v. Lancaster, Barnes' Notes, 125, before cited, this very point was decided. *Non assumpsit*, was pleaded to an action on the case (e. g., trover), and was held not to be cured by a verdict, but was bad in arrest of judgment.

Looking, then, to many precedents as well as correct principles in pleading, the issue presented and tried here is not only an improper one for the case, but not containing enough to cover all that is material in the declaration, and being thus imperfect in substance, it "does not determine the right between the parties," and is not cured by the verdict or the statute of jeofails.

A moment as to the defects in the verdict. It is difficult to see how an immaterial and bad plea can be cured by a verdict, which, as in this case, is quite as immaterial as the plea. Indeed, in some respects the verdict here compared with the declaration is more defective and irremediable than the plea. It is laid down in Comyn's Dig., Pleader, S., 24, that a verdict is even void if it be "variant from the declaration;" and he gives as one illustration from 2 Roll. 703, 1, 35, "in *assumpsit*, if he finds a different promise."

In the present case the promise is found not only different from that laid in the declaration as inducement, but the verdict varies in other essential respects from the declaration, finding nothing of any of the misfeasance charged in it on the defendant. The defect here, then, is in the verdict as well as plea, and though a mere informality in the former is cured by the act of congress as to amendments (16 Pet. 319), yet the defect here is similar in both, and, as just shown, being on principle, in both, a defect in substance no less than form, is uncured. *Stearns v. Barrett*, 1 Mason, 170, and 2 Mason, 31. * * *

CHAPTER IV.
OF THE FULL PROCEEDINGS IN AN ACTION AT LAW.*

*See Secs. 1608-1636, Vol. 10, Cyclopaedia of Law.

CHAPTER V.
OF THE RULES OF PLEADING.*

*Of Demurrers, Their Nature and Properties—Effect of
a Demurrer.***

BROWN v. DUCHESNE.

2 Curtis, Circuit Court for Massachusetts, 97. 1854.

CURTIS, J. This is an action on the case for the violation of a patent-right. The defendant pleaded the general issue and two special pleas. The plaintiff demurred as follows: "And the said plaintiff says that the several pleas by the said Duchesne, in manner and form aforesaid pleaded, and the matters therein contained, are insufficient to bar the plaintiff," etc., in the usual form of a demurrer. And he assigns several cases of demurrer specially. Without regard to the defects of form specially pointed out, if this demurrer is taken to all the pleas, and any one is found good, the demurrer is overruled. There is certainly one good plea, for the general issue, in the usual form, is upon the record. And it is clear the demurrer covers all the pleas. It applies in terms to the several pleas, which means all the several pleas.

There is a settled form of replying to one or more pleas to the exclusion of others, which is "as to the said pleas by the said defendant secondly, or secondly and thirdly, above pleaded," etc. When not thus restricted, the legal intentment is that all are included in the answer made to them.

THE DEMURREL MUST BE OVERRULED.

*See Sec. 1637, Vol. 10, Cyclopaedia of Law.

**See Sec. 1639 et seq., Vol. 10, Cyclopaedia of Law.

CLEARWATER v. MEREDITH.

1 Wallace, 25. 1863.

Plaintiff brought suit on a guaranty made by defendant Meredith, that the stock of the Cincinnati, Cambridge & Chicago Short Line Railroad Company, two hundred shares of which had been transferred by the defendant to the plaintiff in payment of a farm, should be worth par, \$50 per share, in Cincinnati, on October 1, 1855. The plaintiff alleged that the shares were at that date worthless. The defendant pleaded, among other things, that the said railroad company had consolidated with another company, under the laws of Indiana, whereby said stock had become of no value, and that said consolidation was with plaintiff's acquiescence and consent.

Opinion by Mr. Justice DAVIS.

In order to arrive at a correct solution of this question, it is important to consider whether the *plea* is a good one, for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter which has arisen subsequent to it to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater, having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants. * * *

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defendants were stockholders in any of the roads whose interests were merged, and, if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account they would still be liable on their contract, the answer is that this is not a matter to be negatived by the

defendants, but the plaintiff should reply the fact. 1 Chit. Pl. 222.

It follows that the fifth plea presented a complete defense in bar of the action.

In this plea there were two points and two only which the plaintiff had the right to traverse. He could deny either the act of consolidation or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defense was destroyed. The truth of both was essential to perfect the defense. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law. 1 Chit. Pl. 654.

The last replication *does* traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was destroyed and rendered worthless and of no value was not a question for a jury to try. If the roads were consolidated with the consent of the plaintiff, then it followed as a conclusion of law that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his replications reviewed here. This he cannot do. Each replication in this cause is complete in itself; does not refer to, and is not a part of, what precedes it, and is new pleading. When the plaintiff replied *de novo* after a demurrer was sustained to his original replication, he waived any right he might have had to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication when he availed himself of the leave of the court and filed a third and last one.

But the plaintiff insists that even if his replication was bad, that still upon the whole record he was entitled to judgment, because the first and fourth pleas were undisposed of. If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitably for them, because the plea was *in bar* of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete

defense, it would have been useless to have tried other issues, for, no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." Gould's Pleading, ch. 9, § 42. "And when the defendant's plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the pleading, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." Tidd's Practice (4th Am. ed.), 741-42. There is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

TYLER v. HAND.

7 Howard, 573-586. 1848.

Error to U. S. Circuit Court, Northern District of Mississippi.

Mr. Justice WAYNE. This suit is brought upon ten bonds payable to Martin Van Buren, president of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaw Indians of September, 1830. 7 Stats. at Large, 336. The principal and interest due upon the bonds are demanded, and the plaintiff in the action, John Tyler, sues as successor of Martin Van Buren, and trustee for the orphan children.

The defendants have demurred to the plaintiff's declaration, pursuing the usual form of a general demurrer, and have added thereto several special causes of demurrer. There is a joinder in demurrer. Upon these pleadings the court below sustained the demurrer of the defendants. It is that judgment which is now before this court by writ of error.

In our opinion there is error in the judgment. We shall reverse it with an order to the court below to enter up a final

judgment for the plaintiff. The cause is not before us on the grounds upon which it was placed in argument by the counsel of the defendants, except as to the insufficiency of the facts averred in the plaintiff's declaration to entitle him to recover, or to enable the defendants to sustain their demurrer.

A demurrer is an objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for some defect in law in the pleading. It admits the facts, and refers the law arising thereon to the court. Co. Lit. 71; 5 Mod. 132. The opposite party may demur when his opponent's pleading is defective in substance or form, but there can be no demurrer for a defect not apparent in the pleadings. This being so, the question now is, whether or not, notwithstanding the objections in substance and form which the defendants have made to the plaintiff's declaration, sufficient matter appears in the pleadings, upon which the court may give judgment according to the very right of the case. Five special causes of demurrer are assigned; they were, of course, meant to be objections for defects in form, as none other can be assigned in a special demurrer. A general demurrer lies only for defects in substance, and excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception.

Our first remark, then, is that neither of the special causes of demurrer alleged in this case is for a matter of form. They are as follows:

"1. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit.

"2. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same.

"3. That the parties for whose use the suit is brought (who, by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the record.

"4. The said bonds sued on were taken without authority of law, the said Martin Van Buren, president of the United States,

having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office, and not given by law.

"5. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same, and because the said declaration is in other respects informal and insufficient."

The case, then, is before the court upon a general demurrer, in which must be considered the whole record, and judgment should be given for the party who on the whole appears to be entitled to it. *Le Bret v. Papillon*, 4 East, 502. It cannot be better shown in this case for whom the judgment should be, than by showing that the special causes of objection assigned, supposing them to have been made as matters of substance, are not sufficient in law to prevent a recovery by the plaintiff. We will first speak of the fourth and fifth, because they are the chief reliance of the defendants to show that no judgment can be rendered against them.

The fourth is that the bonds given by the defendants were taken without authority of law. The fifth is that it appears from the face of the pleadings that they were given without any actual consideration. Neither of these points can be raised in this case by a demurrer. As to the first of the two, it was not necessary to aver in the declaration that the bonds were taken with the authority of law, nor is it so averred. The bonds are made to the president of the United States and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaw Indians of September, 1830. They are so recited in the declaration, and are admitted by the defendants to have been given by them. In point of law, then, they are valid instruments, though voluntarily given, and not prescribed by law. *United States v. Tingey*, 5 Pet. 115. It is not the case of a bond given contrary to law, or in violation of law, but that of bonds given voluntarily for a consideration expressed in them to a public officer, but not happening

to be prescribed by law. Nor does it matter that they are made to the president of the United States and his successors in office. if the political official character of the president is recognized in them, and is so averred in the declaration. This cause of demurrer, whether well taken or not, admits the fact that the bonds were given, and estops the defendants from denying it as a matter of form, or from contesting by a demurrer the right of the obligee and his successors in office to sue the obligors at law. As to the alleged want of consideration for these bonds, as stated in the fifth special cause of demurrer, that affords no ground for a demurrer, as a bond cannot be avoided at law either for a want or failure of consideration, and anything illegal in the consideration can only be pleaded in bar to the action. *Fallowes v. Taylor*, 7 T. R. 475.

But it is said that these bonds were given without any actual consideration, the president, as it is alleged, having no authority to dispose of the land. What of that? The declaration does not state of whom the purchase was made, or by what authority the sale took place, that they were purchasers of the lands, and that they gave the bonds voluntarily, according to the terms of the sale. Neither of these questions, then, can be raised under the demurrer of the defendants, and could not have been the foundation of the judgment given in their favor.

Having disposed of the fourth and fifth special causes of demurrer, we will now inquire, in their order, whether or not the judgment which was given can be sustained, upon either of the other alleged grounds.

The first is, "that there is no sufficient averment in the proceedings showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain this suit." This cannot justify the judgment, because it is demurring in abatement. In such a case the plaintiff is entitled to final judgment. If the matter of abatement be extrinsic the defendant must plead it. If intrinsic, the court will act upon it, upon motion, or notice it of themselves. *Dockminique v. Davenant*, Salk. 220. But it does not follow, because a demurrer in abatement cannot be available for the defendant, that it is to be rejected altogether from the pleading, if tendered in proper time. It will be received, but

being erroneously put in, it entitles the plaintiff to final judgment, so that for this reason the judgment of the court below would have to be reversed.

Perhaps the best exposition of this point of pleading anywhere to be found is that given in *Furniss et al. v. Ellis and Allen*, in 2 *Brockenbrough's Reports*, 17, by Chief Justice Marshall. He says: "The cases quoted to show that the demurrer is not good do not show that even in England it ought not to be received, if tendered in proper time. In 5 *Bac. Ab.* 459, it is said if a defendant demur in abatement the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement. This does not prove that the demurrer shall be rejected, but that it shall be received, and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. *Salk.* 220, is quoted by *Bacon*, and is to the same purport, indeed, in the same words. These cases show that a demurrer, being in its own nature a plea to the action, and being even in form a plea to the action, shall not be considered as a plea in abatement, though the special cause alleged for demurring be matter of abatement. This court will disregard these special causes, and, considering the demurrer independently of them, will decide upon it as if they had not been inserted in it." And then the chief justice adds, in respect to the particular case then in hand, that "these cases go far to show that the court would overrule the demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings."

The second ground of special demurrer is that the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain an action on the same. Neither fact stated is a matter of form, and cannot, therefore, be a cause for a special demurrer. But taking them as matters of substance, the insertion of them in the plaintiff's declaration is not necessary to show his right to sue and recover upon these bonds, or material for the defendants in their plea. This objection will not avail to sustain the judgment.

The remaining objection to be considered is the third in order

stated, and may be as briefly and as satisfactorily disposed of as some of the rest have been. It is that the parties for whose use the suit is brought are not named, who, by the laws of Mississippi, are the real plaintiffs and responsible for costs. We remark that for whose use the bonds were taken is not recited as personal to any of the Choctaw orphans, but as an aggregate for all such as were entitled to lands under the nineteenth article of the treaty. The demurrer admits that the bonds were so made by the defendants, and that the recital in the declaration is as the fact is expressed in the bonds. The inquiries, then, into who are individually the orphan children residing in the Choctaw nation, or who by name are entitled to a quarter-section of land, or any such averments in the plaintiff's declaration, were not necessary to entitle him to recover, and could not be shown either as a cause of special demurrer or be urged under a general demurrer to prevent a recovery in this case.

All of us are of the opinion that there is nothing in the causes of demurrer which were shown in argument, or in the special causes assigned, to sustain the demurrer; and thinking, as we all do, that nothing has been shown to lessen the obligation of the defendants to pay these bonds or their liability to be sued for them at law, we shall direct the judgment of the court below to be reversed with costs, and shall order the cause to be remanded to the district court with directions to that court to enter judgment in this case (principal and interest) for the plaintiff in that court.

*Of Special Traverses.**

STATE EX REL. BARRELL ET AL. v CHRISTMAN ET AL.

2 Ind. 126. 1850.

Appeal from the Boone Circuit Court.

PERKINS, J. Debt upon an administrator's bond against him and his sureties. The plaintiff is The State upon the relation of Barrell and Hannah. The defendants are John Christman, John H. Nelson, Simon Emmert, Samuel Miller, David Bush, William

*See Sec. 1646 et seq., Vol. 10, Cyclopedla of Law.

D. Porter, Caleb Osborn, and John Porter. The date of the bond is alleged to be the 29th September, 1838. John Christman is the administrator, and upon the estate of John Galvin, deceased. The condition of the bond is stated in the declaration; and, according to that statement, is in the usual form of an administrator's bond. The declaration alleges that, in April, 1840, Barrell and Hannah obtained a judgment against Christman as administrator, upon a debt due from Galvin; and that an execution upon it was returned, no goods, etc., of the deceased Galvin's estate. It then assigns four breaches of the condition of the bond by Christman. The first is that he had received large amounts of the effects of Galvin with which he should have paid such judgment, but that he had wasted them, etc. The other breaches need not be stated. The defendants pleaded separately, and filed in the aggregate fifty-one pleas. The case went off upon demurrer in favor of the defendants; and we shall find it necessary to state but one of the pleas in determining upon the correctness of the decision below.

The eighth plea of William D. Porter was as follows: "The said defendant says actio non, because he says that the said John Christman, on the 29th September, 1838, in the vacation of the Boone probate court, took out special letters of administration on the estate of one John Galvin, deceased; and the said supposed writing obligatory in the plaintiff's declaration set forth, was the supposed bond of the said John Christman, and the other defendants herein, for the faithful discharge of such duties as such administrator; and the said Boone probate court, at its session next ensuing the date of said bond, did not confirm the said special letters of administration, nor continue said bond. And the said defendant avers that, from the 29th September, 1838, until the end of the next session of the said probate court thereafter ensuing, the said John Christman was not guilty of any of the said supposed breaches of the conditions of said bond. Without this,—that the said John Christman was the administrator of the goods, chattels, rights, etc., of the estate of the said John Galvin, deceased, at any time after the end of the session of the Boone probate court next succeeding the said 29th September, 1838; and this," etc.

To this plea the plaintiff replied, giving a minute history of

Christman's vacation-appointment, and averred, "that the said John Christman under and by virtue of said appointment, took upon himself the burden of said administration, and possessed himself of the goods, etc., of said estate, and proceeded to make an inventory, etc., thereof (the said John Porter assisting, etc.); and afterwards, and before the term of said probate court next ensuing his said appointment, said Christman caused said inventory, etc., to be filed in the office of said clerk of said probate court; and at the term of said court next ensuing said appointment of Christman, to wit, at the November term, 1838, said court (whereof Samuel McLean continued to be judge, and who, as such in vacation, approved said Christman's bond) made no order of record in relation to said appointment and said bond; nor did the said court, at said November term, 1838, or at any other term ever recall or set aside the appointment of said Christman or disapprove of said bond, or appoint any other administrator of said estate, or make any other appointment of said Christman, as such administrator; nor was any other or different administration of said estate ever granted, than said appointment of said Christman as aforesaid made; nor was any other security ever given by or on behalf of said Christman in the premises, than the bond aforesaid, and said plaintiff further avers that, by virtue of said vacation-appointment, Christman continued to act as administrator for many years after said November term, 1838, and made reports of his doings as such to said probate court, which said court received and acted upon, and further dealt with and treated said Christman as administrator as aforesaid, under and by virtue of his said vacation-appointment, and after the said November term, 1838; and while said Christman so continued to act as such administrator, under his said appointment, he, the said Christman, committed the grievances, etc., complained of, etc., which the plaintiff is ready," etc.

To this replication a demurrer was sustained, and final judgments given for the defendants.

The replication was to several pleas, all similar to the one we have set out, and what we shall say will apply to all of said pleas.

The plea in question was drawn with an eye to the following provisions of the Revised Statutes of 1838, p. 178, s. 18: "When

any person shall die intestate in the vacation of said court (probate court), and his or her estate is in such condition as to require the immediate care of some person of competent integrity and ability, it shall be lawful for the clerk of such court, in the county in which, by the conditions of this act, administration shall be granted, to grant some such person special letters of administration on the estate of the said deceased until the next ensuing session of said court." "Provided, that such court, at its next ensuing session after the granting of such special letters of administration, at its discretion, may confirm or revoke the same; and if such court shall confirm the granting of said letters, it may, at its discretion, either continue the bond taken as aforesaid by said clerk, or require such administrator to renew said bond, conditioned as aforesaid; and if such court shall revoke such letters, it shall proceed to grant general letters of administration to such person or persons as are or may be legally entitled to the same."

The plea is what is called a special traverse, and its inducement must be, in substance, a sufficient answer to the declaration, though not a direct denial, nor yet a confession and avoidance of it, and the traverse with which it concludes must go to a material point which will try the merits of the cause. We think this substantially such a plea. The declaration goes upon a general appointment as administrator, and alleges breaches occurring nearly two years subsequent to the appointment. The plea, in its inducement, states the appointment to be a special one, made by the clerk in vacation, to continue till the next term of the court; that the appointment was not confirmed at that time and that no breach occurred prior thereto. Now, as the clerk had only power to make an appointment that should continue till the next term of court, and as that made was not, according to the plea, confirmed at that term, it would seem that Christman could not have been administrator of said estate at the time he alleged mal-administration took place; and if not, his sureties could not be liable for it. As to the traverse, it denies directly that Christman was administrator at the time of the commission of the alleged breaches. The decision of that question would certainly determine the merits of the case. It has been objected that the special traverse was not the proper plea to have been adopted on this

occasion; that it should have been a simple traverse of the fact that Christman was administrator at the time of the alleged breaches. Suppose this to be true, as to which we give no opinion. Still, as the plea adopted that very traverse, the inducement can be regarded as nothing worse than surplusage, which does not vitiate on general demurrer, as upon which we must decide upon this plea.

The plaintiff, then, not seeing fit to demur to the plea specially, and it being good, as we have seen, upon general demurrer, what course was left him to pursue in regard to it? Stephen, in his work on Pleading, p. 189, says: "As the inducement of a special traverse, when the denial under the *absque hoc* is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, no manner of pleading to the inducement. The only way, therefore, of answering a good special traverse, is to join issue upon it." See also *The Mayor of Oxford v. Richardson et al.*, 4 T. R. 437; and *Benner v. Elliot*, 5 Blackf. 451. And this is but the general rule as to all good traverses. There cannot be a traverse upon a good traverse, and there cannot be a confession and avoidance of a good traverse. Issue must be taken on it. In this case suppose the defendant had simply traversed the fact that Christman was administrator, could it have been possible for the plaintiff to have confessed the fact that he was not administrator, and still avoided it so as to hold him liable as being administrator?

It remains but to determine whether the replication in this case does take issue on the plea. The plea is, that Christman was not administrator at the time of the alleged breaches. The replication should have simply and directly joined issue upon it. It does not do this, but recites facts and circumstances going to show that Christman was administrator, but not such, we think, as, if true, would establish the fact. The probate court is a court of record. A record of its proceedings is required by law to be kept. Its acts are evidenced by its records. It is admitted in the replication in this case that the court made no entry of record continuing Christman in office, or continuing his bond in force. It is not alleged that any such order was announced by the court, and omitted by the clerk to be recorded. The appointment must have been continued by the court at the term next

after it was made, or it then expired, and no subsequent attempt to continue it could avail. The only fact relied on to evidence such continuance is, that at said next term Christman made report of his doings to that time. This he was bound to do if not continued. The fact, therefore, is of no importance to the question before us; and it will hardly be contended, we think, that any mental determination on the part of the court, unrecorded and unannounced, could be taken as continuance of his appointment. Such a doctrine would be too great an outrage upon the rights of the sureties, who would have a right to look to the record to ascertain the continuance or non-continuance of their liability.

Another point must be noticed. Nelson, one of the defendants, filed the following plea, verified by oath, viz: "that the said supposed writing obligatory in the declaration mentioned, was signed by him upon condition that twelve or fifteen other good men signed it, which was not done; and that unless said number of persons did sign it, it was not to be considered his deed." Demurrer to the plea sustained.

This plea admits the signature of the bond, and does not deny that the same was delivered to the obligee. When so signed and delivered it became absolute. Petersdorf, vol. 9, p. 109, n., says, "If the delivery be to the party himself, it is no escrow; see Hob. 246; Cro. Eliz. 520; for it makes the deed absolute. See 1 Dyer, 34, pl. 25." Pauling et al. v. United States, 4 Cr. 219, and Moss v. Riddle, 5 id. 351, are to the same effect. The demurrer to this plea was rightly sustained.

Per Curiam.—The JUDGMENT IS AFFIRMED, WITH COSTS, ETC.

DIBBLE v. DUNCAN.

2 McLean, Circuit Court for Ohio, 553. 1841.

By the COURT: This is an action of *assumpsit*. The declaration contained a count on a promissory note, one for goods sold and delivered, another for money had and received, etc. Two pleas were filed: First, the general issue; and, secondly, Duncan pleaded that he was not a joint maker with the said Converse

and Birkey of said promissory note, nor was he in anywise interested in the subject-matter of said contract, but that his name was placed upon said promissory note as an indorser merely and guarantor of the payment of the same.

The plaintiffs demurred to this plea, and assigned three causes of demurrer as follows: First. That the plea amounts to the general issue. Second. It states a conclusion of law. Third. If the facts alleged be true they constitute no bar.

It may be admitted that the matters set up in the plea might be proved under the general issue, but it does not follow that the special plea is therefore improper. In the action of *assumpsit* there are many defenses which may be pleaded specially or given in evidence under the general issue. Of this character are all such matters as go to discharge the action, such as infancy, a release, want of consideration, accord and satisfaction, foreign attachment, or that a higher security had been given, payment, etc.

A special plea which amounts to the general issue is bad, and, therefore, a special plea must give express or implied color to the plaintiff's right, and not deny it, as is done by the general issue. By the Reg. Gen. Hil. T. 4 W. 4, all matters in defense in England, except a denial of the promise, are now required to be pleaded specially, and this is justly considered a great improvement in the rules of pleading.

The plea in this case admits the signature of the defendant on the note, but alleges that it was placed there as a security and not as principal. And this is admitted by the demurrer. Now if the defendant Duncan undertook, as a guarantor, to pay the note, and not as principal, he can only be made liable in the character he assumed. As guarantor he was entitled to notice, and it is incumbent on the plaintiffs to show that they have used legal diligence.

The plea gives color to the plaintiff's right, and it therefore does not amount to the general issue. As regards the present action, the effect of the plea, if true, may be the same as the general issue; but the form is substantially different. In many cases it is advisable to plead specially rather than to give the facts in evidence under the general issue, as it may narrow the grounds of defense. The plaintiffs are called upon either to admit or deny the special matter pleaded.

In pleading, facts only are to be stated, and not arguments or inferences, or matter of law. Should a matter of law be stated it may be regarded as surplusage. It is not perceived, however, that the above plea is liable to this objection. 1 Chitt. Pl. 245 (ed. 1837). In the case of *Bright v. Carpenter et al.*, 9 Ohio, 139, it was held "that, where a stranger to a promissory note indorse it in blank at the time of making it, the payee of that note may sue him with the maker as a joint maker of the note, and he is entitled to the privileges of a surety."

"That such blank indorsement may be filled at any time in form to oblige the indorser as principal, or the court may regard it as so filled up. And that proof was admissible to show the intention of the parties as to the extent of the indorsee's liability."

And in *Dean v. Halt*, 17 Wend. 214, "where a note was made by A., payable to B., or bearer, C. indorsed it, and an action was brought by a third person claiming, by transfer from B., charging C. as maker of the note, it was held on demurrer that the declaration was bad."

"It seems that where an indorser to such a note is privy to the consideration he may be charged directly as maker or as indorser, and that a *bona fide* holder may, in all cases, write a bill of exchange over the name of the indorser, or fill up the blank in any form consistent with the intent of the parties."

It is objected to the plea that it does not allege the defendant signed the note as guarantor after its execution. The plea states that the defendant was not in anywise interested in the subject-matter of the contract, but that he signed it as guarantor. This, we think, is sufficient. It shows that the undertaking of the defendant was collateral, and that he cannot be sued as principal.

It may be doubted whether, on general principles, evidence is admissible to show that the defendant is surety when by the terms of the note he appears to be a principal. In *Lacton v. Peat*, 2 Campb. N. P. 185, it was held that an acceptor of a bill of exchange might show that he was merely an accommodation acceptor. And under this authority the case of *Collett v. Haigh*, 3 Campb. 281, was decided; but these cases were overruled in the case of *Fentum v. Pocock*, 5 Taunt. 192. In *Rees v. Berrington*, 2 Ves. Jun. 540, Lord Loughborough says, where two are bound jointly and severally, the surety cannot aver by pleading that he

is bound as surety; and to this effect is the case of *Garrett v. Jull*, Selwyn, N. P. 393.

It is not important on what part of the note a guarantor shall sign his name. It may be placed on the back or face of the note; and the intent with which the name was indorsed, it would seem, might be shown by parol. There could be no doubt of this if the effect of the indorsement was in itself doubtful, and the note was in the hands of the payees. This would be in explanation of the indorsement, and not against its terms or legal effect.

As appears from the plea, the defendant Duncan was not privy to the consideration, and the case in *Wendell*, above cited, sustains the plea.

The decision from the Ohio reports, in the admission of parol evidence, may have been influenced by a statute which requires an execution to be levied first on the property of the principal.

Upon the whole, we think that the demurrer to the plea must be **OVERRULED**.

